

89-283

Supreme Court, U.S.

FILED

JUL 17 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

AMY TRAVEL §
SERVICES, INC. et al. §

Petitioners §

v. §

NO. _____

FEDERAL TRADE §
COMMISSION §

Respondent §

Appeal from the United States
Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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RESORT PERFORMANCE, INC.,
RESORT TELEMARKETING, INC.
MARKETING, INC., THOMAS P.
McCANN, II, JAMES F. WEILAND

79 PP



QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER THE SEVENTH CIRCUIT ERRED
IN HOLDING THAT THE F.T.C. HAD
STATUTORY AUTHORITY TO SEEK AND
THAT THE MAGISTRATE HAD AUTHORITY
TO GRANT RELIEF OTHER THAN A
PERMANENT INJUNCTION.

- II. WHETHER THE SEVENTH CIRCUIT ERRED
IN HOLDING THAT THE DISTRICT COURT
CORRECTLY ADJUDGED THE INDIVIDUAL
PETITIONERS LIABLE.
 - A. WHETHER THE DISTRICT COURT
APPLIED AN ERRONEOUS STANDARD
OF INDIVIDUAL LIABILITY

 - B. WHETHER THE DISTRICT COURT
MISAPPLIED THE STANDARD OF
LIABILITY TO THE FACTS

 - C. WHETHER THE DISTRICT COURT'S
FINDINGS OF FACT SUPPORTING
THE JUDGMENT ARE CLEARLY
ERRONEOUS

- III. WHETHER THE SEVENTH CIRCUIT ERRED
IN AFFIRMING THE DISTRICT COURT'S
EXCLUSION OF THE TESTIMONY OF
PETITIONER'S RELIANCE ON COUNSEL.

THE HISTORY OF THE UNITED STATES

FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME
BY JAMES M. SMITH
IN THREE VOLUMES
VOLUME I
FROM THE FIRST SETTLEMENTS TO THE END OF THE SEVENTEENTH CENTURY

NEW YORK: PUBLISHED BY J. B. LIPPINCOTT & CO., 15 N. 2ND ST.
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LIST OF PARTIES

1. Amy Travel Service, Inc.
2. Resort Performance, Inc.
3. Resort Telemarketing, Inc.
4. Thomas P. McCann, II
5. James F. Weiland

There are no parent companies, affiliates, or non wholly-owned subsidiaries.



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STATUTES FOR REVIEW

1. 15 U.S.C. §53
2. 15 U.S.C. §57b

(Copies of these statutes are contained in the Appendix).



REFERENCE TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit for the case below is reported as FTC v. Amy Travel, No. 88-1977, slip op. (7th Cir. April 19, 1989) and a copy is contained in the Appendix to this Petition.

The District Court did not issue an opinion. The District Court's Findings of Fact and Conclusions of Law are contained in the Appendix.

STATEMENT OF JURISDICTION AND BASIS
OF JURISDICTION BELOW

Petitioners Resort Performance, Inc. and Amy Travel Service are Illinois corporations with principal places of business in Naperville, Illinois; Resort Telemarketing, Inc., is an Indiana



corporation with principal place of business in Indianapolis, Indiana. Petitioners James F. Weiland is a citizen of Illinois and Thomas P. McCann, II is a citizen of Indiana.

The District Court had jurisdiction of this case pursuant to 28 USC §§1331, 1337(a) 1345, 15 USC §§53(b) and 1607. The United States Court of Appeals for the Seventh Circuit had jurisdiction of this case pursuant to 28 USC §1291. This is an appeal from the District Court's final judgment granting a permanent injunction, restitution of monies, rescission of contracts and the imposition of personal liability on the individual Petitioners James F. Weiland and Thomas P. McCann, pursuant to 15 USC §52.



The District Court's judgment was entered on May 4, 1988 and a final monetary judgment requiring the Petitioners to pay \$6,629,100.00 was entered on June 29, 1988. The case was timely appealed to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the judgment of the District Court in its opinion decided on April 19, 1989, a true copy of which is contained in the appendix to this petition. The Supreme Court has jurisdiction of this case by writ of certiorari pursuant to 28 USC §1254.

STATEMENT OF THE CASE

The Petitioners in this case are three corporations and two individuals. The corporations are Resort Telemarketing ("RTI"), Resort Performance ("RPI"),



and Amy Travel Service, Inc. ("Amy"). The individuals are Thomas P. McCann, II and James F. Weiland. Thomas P. McCann, II ("Tom McCann") and James F. Weiland ("Jim Weiland") were the directors and owners of the corporations. The companies marketed discount vacations through their company by selling a vacation certificate ("passport").

RPI was incorporated in Illinois in September 1985 to market vacation certificates and was located in Naperville, Illinois. (T.15P.612).¹ RTI was

¹T.15P.612 - This shorthand will be used throughout the brief for citations to the record. The "T" stands for transcript, "15" is the date of the hearing in December, "P" is for P.M. ("A" will designate the A.M. session)
(Footnote Continued)



incorporated under the laws of Indiana in June 1986 to telemarket the vacation certificates and was principally located in Indianapolis, Indiana. (T.15P.617). Amy was incorporated under the laws of Illinois as a travel agency and was purchased by Petitioners to arrange trips for purchasers of the vacation certificates. (T.14A.372).

Together, these defendant companies along with other marketing companies in Texas, Colorado, Illinois, and Kentucky offered a vacation package to retail and wholesale purchasers. Telemarketers

(Footnote Continued)

and "612" is the page. Therefore, this citation is to page 612 of the transcript for the afternoon of December 15, 1987.



sold the vacation certificate for between \$289 and \$329. (T.13P.348, T15A524) This certificate allowed consumers to book discount vacations through Amy at a guaranteed price which was less than the amount charged for one round-trip, year-round, unrestricted, full economy, Y-class airfare. (T.15A.-501, T.15P.613). For this price, consumers would receive plane tickets and hotel vouchers for 8 days and 7 nights at a variety of popular vacation spots. (T.14A.340). The actual cost to Amy depended on season and variability of wholesale rates and could not be given during the sales call. (T.15A.518, T.16P.813).

The Defendants' profit was made on the sale of the certificates instead of



the normal percentage increase used by other travel agents. Operationally, Amy was managed by: (1) Cecilia Pradhan, who was responsible for all customer travel arrangements, (2) Tom McCann was responsible for marketing operations, and (3) Jim Weiland oversaw business in general. (T.15P.651,652, T.16P.870).

The FTC filed a complaint for a temporary restraining order and preliminary injunction on August 3, 1987 and the temporary restraining order was issued that day. The complaint alleged four counts of deceptive and unfair trade practices under sections 5(a) and 13(b) of the Federal Trade Commission



Act.² Count I alleges that Petitioners represented to purchasers that they were entitled to fully paid vacations, including roundtrip airfare and hotel lodging for eight days and seven nights for the price of the vacation passport alone. Count II alleges that Petitioners represented to consumers that the only additional cost for the package was "one standard, all year, full economy (Y-class) airfare", which was false because Y-class is the highest priced coach fare. Count III alleged that Petitioners represented that they needed consumer's credit card numbers solely to

² Sections 5(a) and 13(b) of the FTC Act are the same as U.S.C. §§45, 53(b).



verify them when instead consumers were charged for the vacation passport. Count IV alleges that Petitioners represented that consumers would not be billed, when they were billed.

The District Court entered the Final Order of Permanent Injunction and Restitution ("Final Order") on May 4, 1988. It ordered Petitioners to pay, jointly and severally, \$6,629,100.00 in redress for restitution and rescission and enjoined them from selling or marketing vacation packages, among other things.

The Final Order of the District Court was affirmed by the United States Court of Appeals for the Seventh Circuit in its opinion, FTC v. Amy Travel, No. 88-1997, (7th Cir. April 19, 1989), a



copy of which is contained in the Appendix.

ARGUMENT

ISSUE I: WHETHER THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE FTC HAD STATUTORY AUTHORITY TO SEEK AND THE MAGISTRATE HAD AUTHORITY TO GRANT RELIEF OTHER THAN PERMANENT INJUNCTION.

Section 53(b) of the Act³ provides in part as follows:

Provided further, that in proper cases the Commission may seek and after proper proof, the court may issue, a

³In the discussion of the FTC Act, sometimes the numbering of sections can be confusing. Some cases refer to the section number of the FTC Act itself, while others refer to the section of the FTC Act as embodied in the U.S.C. For reference, generally three sections are constantly referred to herein. Section 5 of the FTC Act is §45 of the U.S.C.; §13 of the FTC Act is §53 of the U.S.C.; and §19 of the FTC Act is §57 of the U.S.C.



permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

15 U.S.C. §53(b) (1976) (emphasis added).

In the emphasized portion of the statute (which will herein be called the "Permanent Injunction Proviso" or simply the "Proviso"), it is evident that the statute by its terms states only that the FTC may seek, and a district court grant, permanent injunctions, and does not state that a court in so hearing a case for permanent injunction may apply all equitable powers which would otherwise be available. Nevertheless, the FTC in this case sought and obtained not only a permanent injunction, but also received other equitable remedies as



well, such as (i) rescission of contracts⁴; (ii) restitution of amounts to customers; and (iii) the imposition of personal liability on the shareholders of the Petitioner corporations (herein sometimes referred to as the "Individual Petitioners"). The question of whether the FTC has statutory authority under Section 53(b) of the Act to seek rescission, restitution, and the imposition of personal liability in connection with a permanent injunction action and whether a district court has jurisdiction to

⁴While "rescission" is not technically referred to in the court's order, in ordering restitution of monies to consumers, rescission of contracts wherein such monies were obtained is implicit.



grant such relief has been specifically addressed by only the Seventh and Ninth Circuits, which have answered that question in the affirmative. See e.g., FTC v. Amy Travel, No. 88-1997, slip op. at 13-14 (7th Cir. April 19, 1989), and FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).⁵ This

⁵ See FF (Findings of Fact) 22. The Magistrate also relied on the case of FTC v. U.S. Oil & Gas Corporation, 748 F.2d 1431 (11th Cir. 1984), which in a very brief per curiam opinion agrees with the Ninth Circuit's conclusions in Singer, although with little substantive analysis, and FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982), wherein court held that the first proviso of §53(b), authorizing preliminary injunctions pending issuance of administrative complaints, authorized a grant of ancillary equitable relief under the "doctrine of inherent equitable jurisdiction." Id. at 721. See (FF 22).



issue, however, is one of first impression for the Supreme Court. It will be shown that the Circuit Courts have erred in their construction of the statutes.

The issue is twofold. First it must be determined whether the FTC in connection with seeking a permanent injunction under Section 53(b) has statutory authority to additionally seek the equitable remedies of rescission and restitution. The FTC is an administrative agency which is limited to those specific powers which Congress has expressly granted it. Second, it must be determined whether Section 53(b), by an inescapable inference, limits the equitable jurisdiction of the district court.



Section 53(b) does not explicitly or implicitly grant the FTC authority to seek restitution and rescission in connection with a permanent injunction action. Such remedies are not necessary to implement or maintain the integrity of the injunctive relief which the FTC is expressly granted authority to seek. If the FTC is to pursue the equitable remedies of rescission and restitution, it must do so pursuant to the requirements of Section 57b where such authority is expressly granted.

The decisions cited by the FTC are directed towards the issue of whether Section 53 prohibits the district court from granting various kinds of equitable relief in addition to a permanent injunction. These decisions do not



address the threshold issue of whether Congress has authorized the FTC to seek rescission and restitution apart from the procedures contained in Section 57b. There simply is no provision for the FTC to obtain these remedies under Section 53.

Additionally, when the FTC seeks a permanent injunction pursuant to the procedures of Section 53, the statute by inference limits the jurisdiction of the district court to grant only that remedy. An analysis of the authority to the contrary shows that it is not well founded.

In FTC v. H.N. Singer, Inc. 668 F.2d 1107 (9th Cir. 1982), the 9th Circuit found two distinctive bases upon which it concluded that the FTC had the



authority to attempt to procure a temporary injunction. One of these grounds (§57(b)) is clearly irrelevant as that section deals with violations of published FTC rules and previously entered cease and desist orders. The other ground has its basis in the interpretation of the Permanent Injunction Proviso. In Singer, the court in what was clearly dicta⁶ stated that

⁶The Ninth Circuit's reliance on this provision of §53(b) was unnecessary in light of the fact that the defendant there had violated the FTC rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities" (668 F2d at 1109), and thus pursuant to §57(a) and (b) of the Act, the relief sought by the FTC was clearly available pursuant to these sections. It should be noted that the Appellants were not accused of violating any published FTC rule.



because §53(b) "gives the court authority to grant a permanent injunction, it also by implication gives the court authority to afford all necessary ancillary relief, including rescission of contracts and restitution. The power to enjoin is part of what used to be the jurisdiction of equity." Singer, 668 F.2d at 1112. Petitioners submit, however, that the 9th Circuit reached the wrong result. The Magistrate was incorrect in relying on Singer; a district court lacks the power to impose personal liability on individual owners, to rescind contracts and order restitution of money to consumers; a district court may only issue a permanent injunction.



A. Standard to Evaluate

In analyzing the question of whether in empowering a district court to issue permanent injunctions, Congress intended to grant district courts broad equitable powers, such as power to rescind contracts and order individuals to repay amounts, the 9th Circuit in Singer focused on a now-famous excerpt from the case of Porter v. Warren Holding Co.:

Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Virginian R. Co. v. System Federation, 300 U.S. 515, 552

CHAPTER I

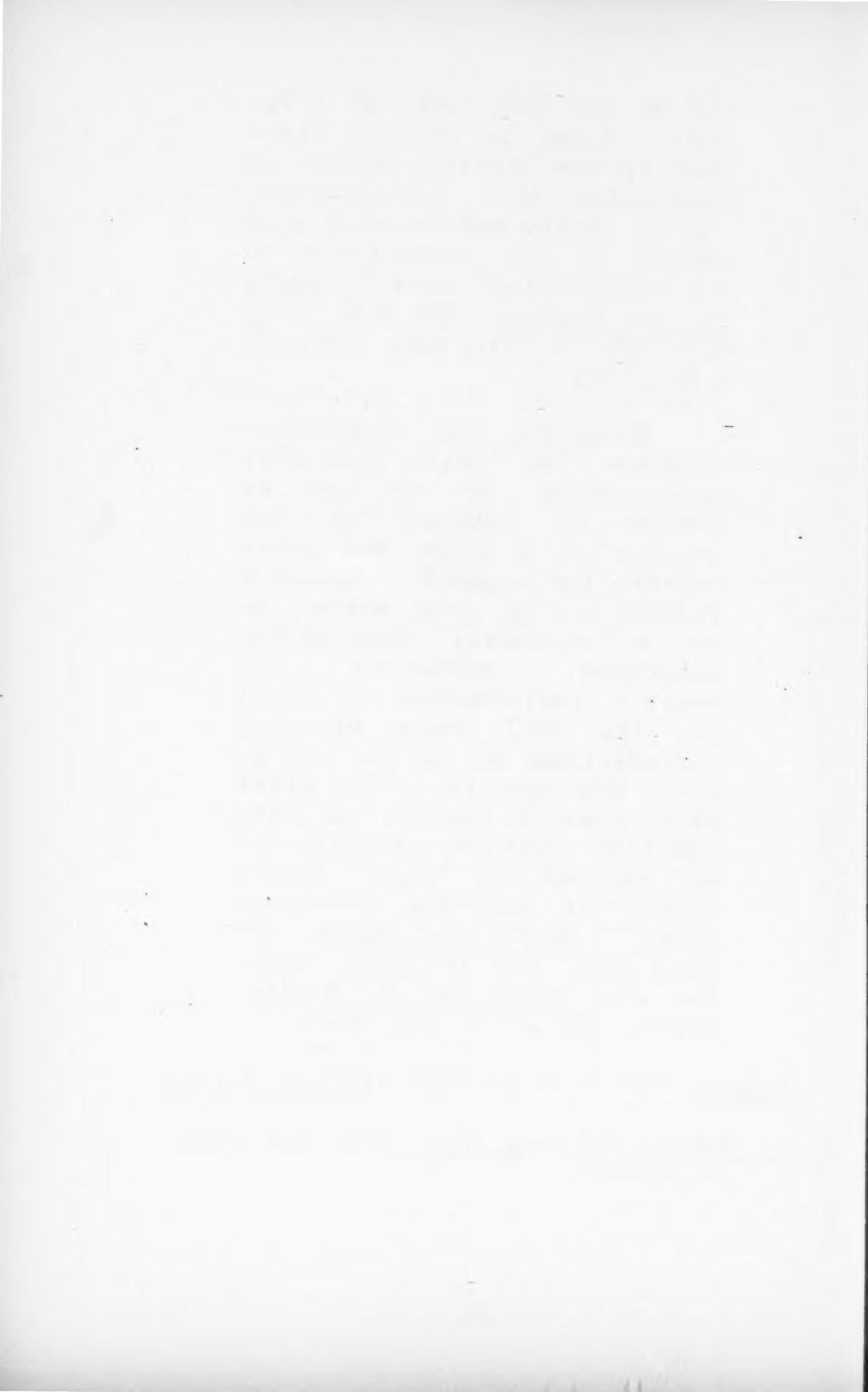
The first part of the book is devoted to a general survey of the subject. It begins with a definition of the term "philosophy" and then proceeds to a discussion of the various branches of philosophy. The author then discusses the history of philosophy, from the ancient Greeks to the modern era. He then discusses the various schools of thought, such as Platonism, Aristotelism, and Stoicism. The chapter concludes with a discussion of the relationship between philosophy and other sciences.

The second part of the book is devoted to a more detailed discussion of the various branches of philosophy. It begins with a discussion of metaphysics, which is the study of the nature of reality. The author then discusses epistemology, which is the study of knowledge. He then discusses ethics, which is the study of morality. The chapter concludes with a discussion of aesthetics, which is the study of art and beauty.

(57 S. Ct. 592, 601, 81 L.Ed. 789). Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mold each decree to the necessities of the particular case." Hecht Co. v. Bowles, 321 U.S. 321, 329 (64. S. Ct. 587, 592, 88 L.Ed. 754).

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. 497, 503 (9 L.Ed. 508). See also Hecht Co. v. Bowles, supra, 330 (64 S. Ct. 592).

Singer, 668 F.2d at 1112 (Citing Porter v. Warren Holding Co., 328 U.S. 395,



398, 66, S.Ct. 1086, 1089, 80 L. Ed 2d 1332 (1946)).

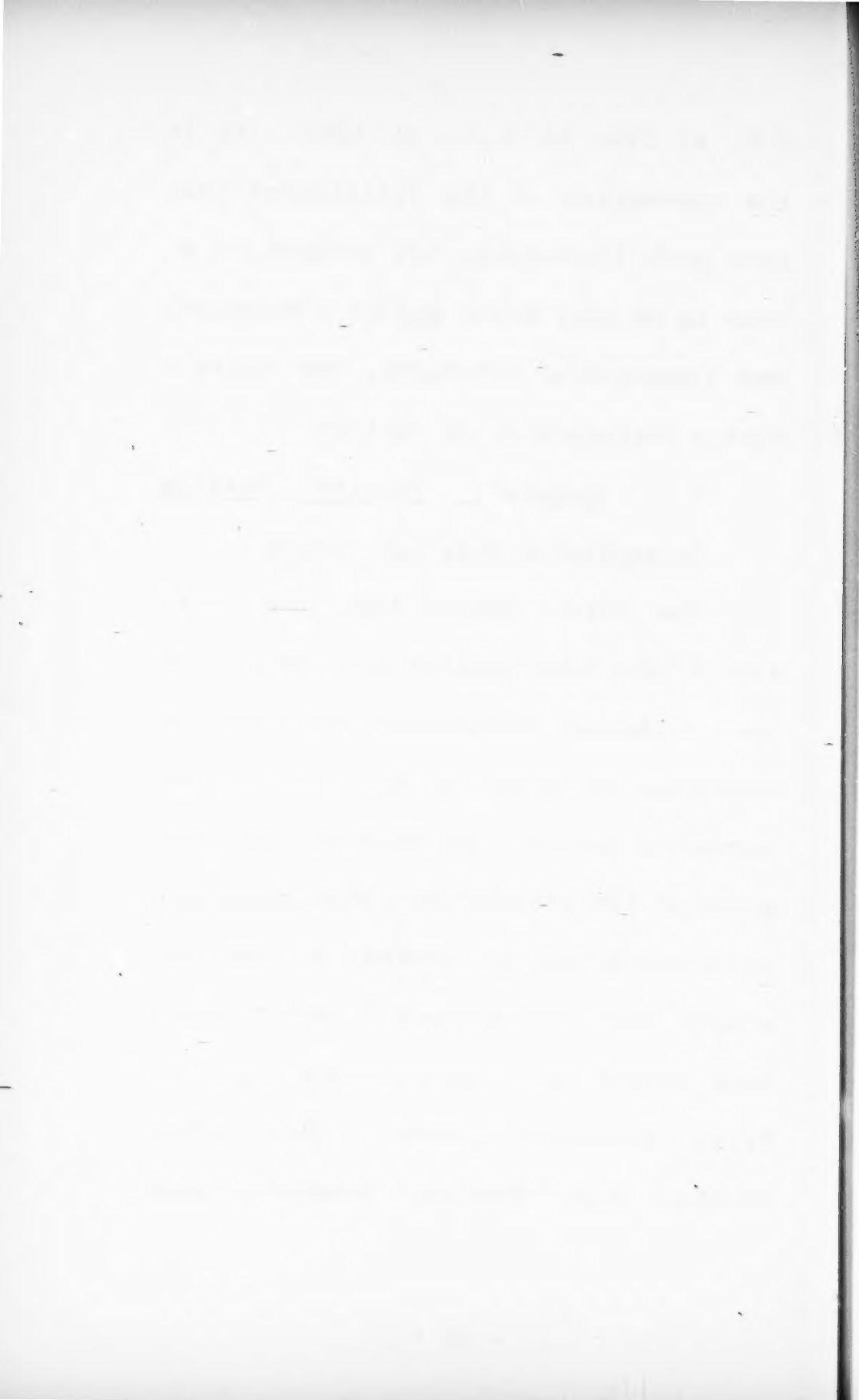
Indeed this is the precise quotation cited by the 7th Circuit in the case of Commodity Futures Trading Commission v. Hunt, 591 F.2d 121 (7th Cir. 1979), where the 7th Circuit addressed the identical question (albeit interpreting a different statute, i.e. the Commodities Act) of whether the Commodities Act, there in question, empowered a court to bring to bear the entirety of its equitable powers, not simply its injunctive powers. As acknowledged by the 7th Circuit in Hunt, the test is whether the FTC Act "in so many words, by a necessary and inescapable inference, restricts the court's jurisdiction in equity...." Porter, 328



U.S. at 398; 66 S.Ct. at 1089. It is the contention of the Petitioners that both such limitations are present, i.e. that in so many words and by a necessary and inescapable inference, the court's equity jurisdiction is limited.

B. Statute's Precise Wording
Necessitates This Conclusion

The first reason that the court should have been limited only to a trial for permanent injunction and not be permitted to bring to bear all of its equitable powers, is because the language of the statute says that permanent injunctions may be entered; it does not simply say "injunctions," which might lend itself more towards the logic of broad equitable powers. This point becomes even clearer, however, when



different cases analyzing the same question for different statutes are reviewed.

For example, the Hunt case analyzed in part the propriety of a district court's refusal to issue an order compelling defendants in that case to disgorge profits they obtained as a result of their illegal activity. Id. at 1221. The Seventh Circuit framed the issue as whether disgorgement was an appropriate form of ancillary relief in the Commodity Exchange Act context, and found the issue a "close question." Id. at 1222.

Section 6(c) of the Commodities Act provided that the Commodities Commission could bring in a district court, an action "to enjoin such act or practice,

or to enforce compliance with the chapter, or any rule, regulation or order thereunder...." 7 U.S.C. §13a-1 (1976). The Seventh Circuit noted that while this language did not expressly permit a district court to utilize all of its equitable powers, neither did such language restrict the equitable power. This, however, is not the situation in the present case, where the language of the FTC Act is very narrow:

"Provided further, that in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

15 U.S.C. §53(b) (1976).

Additionally, to further substantiate the point that when Congress chose the term "permanent injunction" it was not intending to allow a district court



to exercise any and all other equitable remedies and powers available to a district court, we need only look at other provisions of the FTC Act itself where different and broader terminology is used in defining and describing various remedies and powers. This illustrates implicitly, if not explicitly, that a district court's power in this context is limited only to the issuance of a permanent injunction. For example, in §53(b) itself, just a few lines above the Proviso under scrutiny, the FTC Act provides that if the FTC Act is being violated and a cease and desist order is promptly sought, the Commission may seek to "enjoin" such acts, and in connection therewith may seek either a temporary restraining order, a temporary

injunction, or both. Certainly, the use of such terms, followed by an express provision which merely references permanent injunctions, must explicitly, if not implicitly, be read as language which should be taken at, and limited to, its express wording.

Language in other sections of the FTC Act is helpful in understanding the scope of this Proviso. For example, §57b(b) also provides that if either a cease and desist order or a promulgated rule is violated, then a permanent injunction may follow.

Again, the point must be obvious that Congress' use of the term "permanent injunction" in the Proviso was intentional and purposeful, particularly when viewed in the context of the

remainder of the statute which contains very precise statements of remedies and powers. The FTC would no doubt call attention to the final sentence in subsection (e) (quoted above) which effectively states that this section does not limit the Commission's authority under any other provision of law. Two responses to this are clear. First, as the 9th Circuit in Singer correctly pointed out, the question under scrutiny is not the Commission's authority, but a district court's. Thus, the limiting sentence in subsection (e) is irrelevant to question. Secondly, however, the proposition is here made that the language used in §57(b) indicates a precise understanding by Congress of the remedies it is granting, and Congress'

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use of the "permanent injunction" language is intentional and should not be expanded.

C. The Legislative History Of §53(b) Supports The Contention Of Petitioners

Many other factors support the contentions of Petitioners. The interpretation of §53(b) given by the Seventh Circuit clearly is inconsistent with Congress' intention in passing §53(b). In the JS&A case referred to above, the 7th Circuit made reference to the legislative history of §53(b). The 7th Circuit noted that while §53(b) was originally introduced as §210 of the Senate bill (S. 356) that led to the Magnuson - Moss Act, it was enacted as part of the Trans-Alaska Pipeline Act. Quoting from that Senate Report, the 7th

Circuit observed that the intent of §53(b) was explained in this legislative history. Because this legislative history is critical to examine, that portion quoted by the 7th Circuit relevant to the Proviso is set forth as follows:

Provision is also made in §210 for the Commission to seek and, after a hearing, for a court to grant a permanent injunction. This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a [sic] early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date. Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of



the Federal Trade Commission Act through the issuance of a cease-and-desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently.

JS&A, 716 F.2d at 457 (quoting S. Rep. 93-151, 93rd Cong., 1st Sess. 30-31 (1973)).

This legislative history reveals two clear points why the interpretation adopted by the Magistrate of the FTC Act, §53(b) should be rejected. First, this legislative history makes it clear that permanent injunctions were to be sought "when a court is reluctant to grant a temporary injunction...." Clearly, if Congress' intention is to permit the issuance of permanent injunctions only when courts are reluctant to issue temporary injunctions, it

cannot be argued that Congress intended to add the additional right of district courts to hear temporary injunction matters and any and all other equitable remedies as a matter preliminary to a permanent injunction. This portion of the legislative history clearly evidences the intention of Congress to limit the applicability of the Proviso to its precise terms. Furthermore, however, the legislative history reveals that the Proviso was intended to give the FTC the right to seek a permanent injunction in those situations in which it did not desire to "further expand upon the prohibitions" of the FTC Act, which would occur otherwise if the FTC sought the issuance of a cease and desist order. In order to properly

comprehend the significance of this statement, the general procedures utilized by the FTC in the cease and desist context (discussed in detail in the following section) must be kept in mind. Thus, in this portion of the legislative history, when Congress states that the Proviso is intended to be utilized in situations in which the FTC does not desire to further expand upon the prohibitions of the FTC Act through the issuance of a complaint, which lead to a cease and desist order, it is clearly intended is that permanent injunctions are appropriate to seek in contexts in which the FTC does not desire to avail itself of the other more expansive rights which the Act specifically grants to the FTC, which are

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otherwise available only through the cease and desist process. The legislative history of §53(b) itself is powerful justification for the Petitioners' position that the district court did not have its full panoply of equitable remedies available to it in deciding this case.

D. Such A Dramatic Statutory Alteration Cannot Have Been Congress' Intention

A careful review of the statutory scheme which governs the FTC as set forth in the FTC Act reveals that the Seventh Circuit's interpretation of the Proviso would not only do violence to the statutory scheme which Congress enacted, it would emasculate this scheme and directly give the FTC some of the very powers which Congress intended that



the FTC not possess. Before analyzing this, a bit of background into the statutory scheme or framework of the FTC Act is in order.

The Federal Trade Commission Act created an administrative body "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." Humphrie's Executor v. U.S., 295 U.S. 602, 628, 55 S. Ct. 869, 874, 79L. Ed. 1611 (1935). Pursuant to §5 of this Act (15 U.S.C. §45(a) (1976)), Congress has empowered and directed the FTC to prevent people and businesses from engaging in deceptive or unfair acts or practices which are in, or affect,

commerce. In the first fifty years of its existence, the Commission carried out this function by means of an administrative adjudicatory proceeding consisting of a complaint and a hearing before an administrative law judge, and if a violation was found, the issuance of findings of fact, along with a recommendation of a cease and desist order prohibiting future violations, was the result. The initial decision of the administrative law judge was reviewable by the Commission itself, and also was reviewable after the Commission had upheld the holding of the administrative law judge, upon petition to the appropriate Court of Appeals of the United States. The statutory framework embodied in the FTC Act provided for civil

THE STATE OF NEW YORK

IN SENATE

JANUARY 1, 1891

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

APRIL 1, 1890

ALBANY:

WEED, PARSONS

1891

PRINTED BY THE

UNIVERSITY OF THE STATE OF NEW YORK

ALBANY

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THE STATE OF NEW YORK

IN SENATE

penalties for the violation of a valid and final cease and desist order, and also provided that if the Commission satisfied a court that an act or practice to which a cease and desist order related was one which a reasonable person would have known under the circumstances was dishonest or fraudulent, relief could be granted under subsection (b) of §57b, which relief specifically empowers a court to grant whatever relief such court deems necessary to redress injury to consumers or other persons resulting from the unfair or deceptive act or practice prohibited by the cease and desist order. Specifically, §57b permits such relief to include, but not be limited to, "rescission or reformation of contracts, the

refund of money or return of property, the payment of damages, and public notification respecting the unfair or deceptive act or practice." 15 U.S.C. §57b (1976).

Courts and commentators alike have noted in the past that such a statutory procedure of having to seek a cease and desist order is in fact a cumbersome process imposed upon the FTC in dealing with unfair or deceptive acts or practices. For reasons hereinafter set out, it is apparent that the "cumbersome" procedure was intentionally devised in light of the lack of specificity and vagueness as to what constitutes "unfair or deceptive" acts or practices. This was the scheme conceived by Congress. In 1973, however,

§53 of the FTC Act was amended in part to include the Proviso. The language of the Proviso has been previously discussed and will not be repeated here. Apparently the current interpretation of the Proviso urged by the FTC was not immediately known to them upon the amendment of the Act. As the 9th Circuit pointed out in the Singer case, by 1982 the Commission had only sought in one other reported case to bring an action under the Proviso.

While the 9th Circuit correctly pointed out that failure to exercise power did not necessarily mean that the FTC lacked power, it is indicative of the fact that the FTC only then realized the argument which could be used to circumvent the otherwise cumbersome

cease and desist adjudicatory processes imposed by the statute. With this background in mind, the Petitioners offer at least three points in support of their position why the Proviso in §53(b) should not be read nearly as broadly as the FTC urges and the Magistrate has found.

The first point urged by the Petitioners in this regard is that the interpretation of §53(b) of the FTC Act sought by the FTC and adopted by the Magistrate works a tremendous foundational alteration of the statutory procedure outlined in the FTC Act. Prior to the 1973 amendments to the Act; the only method which the FTC had to seek the equitable type remedies which it has obtained here was to first obtain

cases and other administrative processes
involved in the statute. With this
background in mind, the testimony
offered at trial seems to be an attempt
of the witness to show that the
statute was not in fact applied as
intended by the legislature and that
therefore the statute should be
declared unconstitutional.

The first point raised by the
petitioner in this regard is that the
interpretation of the statute by the
court in the past was not in line
with the intent of the legislature. The
petitioner states that the legislature
intended that the statute should be
applied in a certain manner and that
the court's interpretation was not in
line with this intent. The petitioner
states that the court's interpretation
was not in line with the intent of
the legislature and that therefore the
statute should be declared unconstitutional.

a cease and desist order, after which a knowing or intentional violation of this cease and desist order would empower the FTC to seek rescission of contracts, reformation of contracts, and imposition of damages -- some of the very remedies which it has now received. In 1973, Congress acted to amend the Act in part by adding the three simple lines which embody the Proviso. The FTC argues, and the Magistrate agrees, that Congress intended to give the FTC the power to choose whether it wants to proceed with an administrative cease and desist order, or simply adjudicate the entire matter (remedies and all) in a district court. Such an interpretation cannot possibly have been intended by Congress. In fact, this position should serve to

make the whole FTC cease and desist process involving allegedly unfair or deceptive acts an anachronistic dinosaur. After all, the equitable remedies of rescission of money, reformation of contracts and things of this nature can only be received in the cease and desist process after the cease and desist order has been issued and then knowingly violated. Rather than go through this, the FTC urges, and the Magistrate has adopted, an interpretation of the Act which allows the FTC to seek the same remedies immediately through the permanent injunction vehicle. What possible motivation or rationale could the FTC have for ever again seeking a cease and desist order when the FTC can accomplish all that it desires to accomplish

make the whole the cause and effect
process involving allegedly matter in
theoretical sense an experimental
and also all the scientific evidence
of knowledge of matter, information of
consequence and change in the nature of
only be revealed in the cause and effect
process after the system has been
has been broken and then analyzed
related to the system and change in
the system, and the hypothesis has
shown an interpretation of the
which shows the system to be
transformed into a new system
and information which is
information in the system and the
that the new system is a new
system which is the new system
all the information in the system

through the permanent injunction procedures?

E. Adoption Of FTC's And Magistrate's Interpretation Would Itself Be Unfair

As alluded to above, the FTC Act, §45(a), which outlaws "unfair or deceptive acts," nowhere defines these terms. This lack of definition has led many to be concerned about citizens being charged with the consequences of involvement in "unfair or deceptive acts" without knowing in advance that their acts would be so held. In a fairly early case which arose in the cease and desist context, the FTC attempted to expand its statutory power (as it does here), and, in connection with a cease and desist order attempted to order a defendant to make refunds. In Heater v.

FTC, 503 F.2d 321 (9th Cir. 1974), the FTC, having found certain acts and practices to be unfair and deceptive considered that it was itself an unfair practice for the defendant to "retain moneys of which he had bilked the franchisees and members." Heater, 503 F.2d at 322. The Commission argued in that case that allowing the FTC to require refunds was "the only order that would bring the illegal conduct to an end" and thus the refunds provision of its order, the FTC urged, was manifestly within the legislative grant of broad remedial discretion. Id. The court, however, rejected this construction by the FTC of its power. The court's analysis is very relevant to the present case, where the FTC again attempts to

expand its statutory authority as it did in Heater . The court reasoned that the construction placed by the FTC upon its power to define and prohibit unfair and deceptive practices would, if accepted, operate to vest the FTC with remedial powers which were inconsistent and at variance with the overall purpose and design of the Act. Particularly, the court felt that such a construction would permit the FTC to act without proper notice. In particular, Congress rejected an amendment which provided a private damage suit based on a Commission finding of a violation of the Act." Heater, 503 F.2d at 324.

The court in Heater was emphatic in its analysis of the legislative history of the Act in pointing out that the

power to attach consequences to prior conduct was thought inconsistent with the Commission's contemplated quasi-legislative and educational function. As a result, recourse for harm suffered before the Commission entered a cease and desist order was left to private suits. The court went on to note that the impact of the refund order which the FTC sought in Heater illustrated the reason Congress did not give the Commission the power it sought to exercise. So far as it appeared from the record, the defendant in that case had received only a salary and loans (some of which loans had even been repaid) from the corporations which he controlled. The corporations which actually had received the illegal funds were bankrupt, and the

FTC order ran only as against the defendant individually. The court noted that aside from whether the defendant was legally liable to refund sums he only constructively received, those funds were expended by the corporations to pay the salaries of employees hired to service accounts and collect member charges. Any assets of the corporations would be applied towards satisfaction of judgments in private civil suits. The FTC's order, however, operated as a determination that, as between the defendant and certain innocent franchisees and members, the defendant ought in fairness to pay the losses out of his personal assets. The court felt strongly that regardless of how egregious the defendant's conduct or how unreasonable

his reliance on the legality of his operation, the FTC was not given the power to recast the consequences of conduct occurring prior to its entry of an order. The court emphatically stated that Congress was unwilling to subject the operation of a business to the risk of subsequent Commission condemnation. 503 F.2d at 325.

Yet, it may well be asked, what have the Commission and the Magistrate done in this case? They have done precisely what the FTC attempted to do in the Heater case, and have claimed the fact that Congress enacted the Proviso which allows the Commission to seek in proper cases a permanent injunction as authority. Congressional concern for proper notice, felt so deeply by the

members of Congress who adopted the FTC Act, was swept aside by the Seventh Circuit merely by virtue of the fact that one sentence was added to the FTC Act, which permits the FTC in proper cases to seek permanent injunctions. Such a conclusion is nothing short of absurd and unfair.

Another problem is inherent with the Seventh Circuit's position in this case. This problem is relevant to both the point that adopting the interpretation of the FTC and the Magistrate would itself be unfair, as well as the preceding point that such a dramatic statutory alteration could not have been Congress's intent. Specifically, the question is, what is the applicable standard by which a court should be

guided in evaluating whether to hold individual officers, shareholders, and directors liable for the acts of a corporation? Again, the Proviso only specifically permits permanent injunctions, and does not address the question about the standards to be applied in imposing personal liability on individuals. At least one court (one of the two relied on by the Magistrate) in grappling with this issue has acknowledged that the "elements of a redress action under §13(b) [§53(b)], are apparently a matter of first impression." FTC v. International Diamond Corp., 1983-2 Trade Cases, ¶65, 506 (N.D. Cal. 1983)(emphasis added). The 7th Circuit should note the use of the term "apparently" in the International

Diamond quotation. These are matters of such significant speculation that the few courts that are addressing these points are really not sure what the law is in this regard. In the International Diamond case, the court held that the applicable legal standard for imposing personal liability on individuals should be analyzed by reference to the mail fraud statute. 18 U.S.C. §1341. Similarly, a district court in Minnesota agreed with this conclusion. See FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282 (D.C. Minn. 1985). It should be noted, however, that nowhere is this issue discussed by Congress or in the FTC Act (going beyond the clear mandate of the Proviso in permitting the imposition of personal liabilities on individuals

sends a district court into unchartered waters). By what standards should a district court be guided? What are the legal limits that should be imposed upon this exercise? Can a corporation be enjoined from violating §45 if a deceptive act can be proved, but the individual owners only held responsible if such was tantamount to mail fraud? These, and other questions like them, are clearly raised if this court chooses to proceed on the assumption that in an action for a permanent injunction, a district court has the authority to impose personal liabilities upon individual owners of a corporation charged with improper conduct.

F. Adoption Of The FTC's Interpretation Of The Proviso Will Result In Bizarre Consequences

Finally, the FTC's interpretation of the §53(b) Proviso should be rejected because the interpretation will result in potentially bizarre consequences. Numerous people have gone on vacations sponsored by the Corporate Petitioners. In this case, however, the Commission is arguing for a restitution of monies to consumers, rescission of contracts, and other types of remedies. But this raises a critical question which was not addressed by the Seventh Circuit. What is to happen with regard to the consumers who have gone on trips and received in full the value of what they bargained for? What is to happen to those consumers who have not been deceived in any

way by any act or practice of the Corporate Petitioners? Those who have not and will not complain? Those who got what they bargained for? In a similar vein, does the action in this context have the effect of making all matters raised in the lower court res judicata, such that if a consumer brings an action against any of the Petitioners in a state court, the Petitioners cannot be brought to trial again there? See, e.g., FTC. v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1296 (D.Minn. 1985). If not, then the Magistrate by adopting the interpretation of the Proviso urged by the FTC, could put the Petitioners in the anomalous situation of, on the one hand, having been ordered to make restitution to consumers, while on the

other hand being subject possibly to suits for specific performance, and/or damages, filed by consumers in various state court actions. The uncertainty created by this scenario is created only because the Magistrate, at the urging of the FTC, by virtue of an erroneous interpretation of §53(b) of the Act, seeks to attempt to undo the effect of the Corporate Petitioners' contractual relations with customers. This, quite simply, is something which neither the Court nor the FTC is empowered to do.

To reiterate, it is the contention of the Petitioners in this case, that as a result of the Proviso, the FTC is empowered only to seek, and a district court grant, a permanent injunction; a district court is not empowered in a

permanent injunction suit to seek a freezing of assets, a restitution of monies which may or may not be owed to consumers, rescission of contracts or impose personal liability on the Individual Petitioners.

ISSUE II: WHETHER THE SEVENTH CIR-
 CUIT ERRED IN HOLDING
 THAT THE DISTRICT COURT
 CORRECTLY ADJUDGED THE
 INDIVIDUAL DEFENDANTS
 LIABLE

Assuming arguendo, that the Corporate Petitioners are liable for restitution, the FTC must still prove that the Individual Petitioners are liable for the actions of the corporation. A prima facie case for individual liability was not made by the FTC, and the Petitioners had uncontested rebuttal on elements necessary to impose individual liabil-

ity. An abuse of discretion spans an entire family of review standards. Grant or denial of an injunction on purely factual matters is reviewed on a determination of clearly erroneous. If the decision is based on balance of harm, or mixed law and fact, then the review standard is if the decision is unreasonable. Review of purely legal determinations is plenary. Dynamics Corp. of America v. CTS Corp., 805 F.2d 705,709 (7th Cir. 1986). American Hospital Supply Co. v. Hospital Products Ltd., 780 F.2d 589, 594 (7th Cir. 1986). The District Court failed to correctly apply the law to the findings of fact when imposing liability. Additionally, the Court arrived at findings of fact which are clearly erroneous.

A. The District Court Applied an Erroneous Standard of Individual Liability.

The law on finding individual liability for restitution has been set forth in three cases. FTC v. Kitco of Nevada, Inc., 612 F. 28 Supp. 1282 (D. Minn. 1985); FTC v. International Diamond, 1983-2 Trade Cases (CCH) 65,506 (N.D. Cal. 1983); FTC v. Atlantex Assoc., 1987-2 Trade Cases (CCH) 167,788 (S.D. Fla. 1987). The original standard had four required elements:

- (1) that the individuals knew that their companies or one or more of their agents engaged in dishonest or fraudulent acts or practices;
- (2) that the individual defendants either directly participated in the fraud or had the authority to control them; and

The following is a list of the
names of the persons who
were present at the meeting.

The first of the persons who
were present at the meeting
was Mr. J. H. Smith. He
was followed by Mr. J. H. Smith.
The next person who was
present at the meeting was
Mr. J. H. Smith. He was
followed by Mr. J. H. Smith.
The next person who was
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The next person who was
present at the meeting was
Mr. J. H. Smith. He was
followed by Mr. J. H. Smith.

(3),(4) basically that the corporation is liable because of deception and consumer injury.

Kitco, 612 F.2d at 1292. Point (2) was further clarified so that direct participation was not necessary, but awareness plus failure to act within one's authority to control is sufficient. Atlantex, supra. It is therefore clear that imposition of liability involves the necessary elements of both knowledge and a failure to act. The FTC and District Court repeatedly asserted that motive and intent were irrelevant. However, the above standard clearly includes the elements of knowledge and a failure to act. These are merely variations on the traditional concepts of intent.

The cases cited by the FTC for the

proposition that intent to deceive is not a necessary element of an FTC violation all dealt with cease-and-desist orders or injunctions. In such cases, corporations and individuals are being directed to refrain from certain conduct. This case involves holding an individual liable for monetary restitution. In this situation, a finding of bad faith or intent to deceive should be required before imposing such a sanction. See Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 309 (7th Cir. 1979) (extent of party's culpability should affect nature of relief granted). District courts have held that to find an individual liable for restitution under § 53(b), the FTC must prove that the defendant knew or should have known

that the conduct was dishonest or fraudulent. See FTC v. International Diamond Corp., 1983-82 Trade Cas. (CCH) § 65,725 at 69,706-07 (N.D. Cal. 1983) (to hold defendant liable for redress under §53(b), defendant's activity must rise to the level of fraud or dishonesty); FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1292 (D. Minn. 1985) (to obtain monetary equivalent of rescission, FTC must prove defendant had knowledge that corporation or its agents "engaged in dishonest or fraudulent conduct"); FTC v. Atlantex Assoc., 1987-2 Trade Cas.(CCH) ¶67,788 at 59,255 (S.D. Fla. 1987).

Historically, since the creation of the FTC, businesses were put on notice that their conduct was improper through

the cease and desist procedure of §57 of the FTC act. Corporate directors and corporations were not liable for monetary damages unless they later knowingly violated a prior order. By requiring a finding of fraud to impose liability under §53b, a standard similar to that existing under §57 is retained. Businessmen and companies who unknowingly use language in a sales script found to be deceptive would be given a chance to remedy the situation on their own. This Court should determine that a finding of intent to deceive or bad faith is required before monetary rescission or restitution may be awarded against an individual under 15 U.S.C. §53(b). Accordingly, the District Court and Seventh Circuit erred in imposing the

wrong legal standard of liability on the Petitioners.

B. The District Court's Findings Of Fact Supporting The Judgment Are Clearly Erroneous.

Even if the Court did not misapply the law to the facts, the Court was clearly erroneous on several findings of fact necessary to prove essential elements of individual liability. The Court upholds the findings of knowledge by stating that "McCann and Weiland designed and on a day-to-day basis oversaw the sales operation." (FF p.32). However, there is no evidence on the record that Jim Weiland was involved with the day-to-day sales operations. Instead the testimony indicates that he primarily worked with Amy and did administrative duties. Jim Weiland did

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

REPORT OF THE

COMMISSIONERS OF THE

BOARD OF EDUCATION

FOR THE YEAR

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CHICAGO, ILL.

1901

not exercise control over the marketing operations. Tom McCann was responsible for the sales offices (T.15P.651,652, T.16P.870). The Seventh Circuit erred in affirming the District Court's finding that Jim Weiland was individually liable because there is no evidence to support that finding and the District Court's judgment against Jim Weiland should be set aside.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners, Amy Travel Service, Inc., Resort Performance, Inc., James F. Weiland, and Thomas P. McCann, II, respectfully request the following relief:

- (1) That this Court grant Peti-

tioner's Petition for Writ of Certiorari;

(2) That the Seventh Circuit's opinion affirming the judgment of the District Court be reversed;

(3) That the District Court's Final Order be reversed in its entirety or, in the alternative, that the part of the Final Order which award monetary damages in the form of rescission and restitution against Petitioners be reversed and set aside; and

(4) In the alternative, that the part of the District Court's Final Order which awards monetary damages against the individual Petitioners, James F. Weiland and Thomas P. McCann, II be reversed and set aside.

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THE HISTORY OF THE UNITED STATES OF AMERICA

RESPECTFULLY SUBMITTED,
BENNETT & BROOCKS

Robert S. Bennett

Robert S. Bennett
Ben C. Broocks
H. Victor Thomas
712 Main Street, Suite 1500E
Houston, Texas 77002-3209
(713) 222-1434
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing corrected Petition for Certiorari was served via U. S. Mail to Mr. Melvin Orleans and Mr. Larry Hodapp, Attorneys at Law, Federal Trade Commission, 6th and Penn. Avenue, N.W., Washington, D.C. 20580, and three copies of the corrected Petition were served on the Solicitor General, Department of Justice, Washington, D.C. 20530 on this the 9th day of August, 1989.

H. Victor Thomas

H. Victor Thomas



IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

AMY TRAVEL	\$	
SERVICES, INC. et al.	\$	
	\$	
Petitioners	\$	
v.	\$	NO. _____
	\$	
FEDERAL TRADE	\$	
COMMISSION	\$	
	\$	
Respondent	\$	

AFFIDAVIT OF H. VICTOR THOMAS

STATE OF TEXAS \$
COUNTY OF HARRIS \$

BEFORE ME, the undersigned
authority, on this day personally
appeared H. Victor Thomas, known to me,
who upon oath deposed and said:

"My name is H. Victor Thomas and
I reside at 4620 Pin Oak Ln., Houston,
Texas 77401. I am over the age of
eighteen and have never been convicted
of a felony.

"Three copies of the Petition for
Writ of Certiorari were mailed to Melvin
Orleans and Lawrence Hodapp at the

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

TO THE SECRETARY OF THE INTERIOR
FROM THE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT
SUBJECT: [Illegible]

[Illegible text block containing several paragraphs of a memorandum or report]

Federal Trade Commission, 6th St. and Pennsylvania Ave., N.W., Washington, D.C. 20580 on July 17, 1989 and three copies of the corrected Petition were mailed to the above parties and address on August 9, 1989. All mailings were by the U.S. mail, first-class, postage prepaid.

"Three copies of the corrected Petition for Writ of Certiorari have also been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing in the U.S. mail by first-class postage prepaid.

"Further Affiant Sayeth Not.

"I state on penalty of perjury that the foregoing statement is true and correct to the best of my belief and knowledge."

Executed on this 9th day of August, 1989.

By: H. Victor Thomas

H. Victor Thomas

Federal Trade Commission, 415 F.2d 1017
Remanded to the District Court for the
District of Columbia on July 15, 1969 and
copied to the Federal Trade Commission
and the District Court for the District of
Columbia on July 15, 1969. All parties were
to appear on July 15, 1969. This case was
remanded.

The District Court for the District of
Columbia, on July 15, 1969, remanded the
case to the District Court for the District
of Columbia. The District Court for the
District of Columbia, on July 15, 1969,
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the District of Columbia. This case was
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of Columbia. The District Court for the
District of Columbia, on July 15, 1969,
remanded the case to the District Court for
the District of Columbia. This case was
remanded.

SUBSCRIBED AND SWORN TO BEFORE
ME, the above Affidavit of H. Victor
Thomas on the 9th day of August, 1989,
to certify which witness my hand and
official seal of office.

Gaylynn Lowery
Notary Public in and for
the State of Texas

My Commission Expires:

7-10-91



89-283

(2)

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

Supreme Court, U.S.

FILED

JUL 17 1989

JOSEPH F. SPANIOLO,
CLERK

AMY TRAVEL §
SERVICES, INC. et al. §

Petitioners §

v. §

NO. _____

FEDERAL TRADE §
COMMISSION §

Respondent §

Appeal from the United States
Court of Appeals
for the Seventh Circuit

APPENDIX

Robert S. Bennett
Ben C. Brooks
H. Victor Thomas
BENNETT & BROOCKS
712 Main, Ste. 1500E Houston,
Houston, Texas 77002

ATTORNEYS FOR PETITIONERS,
AMY TRAVEL SERVICE, INC.
RESORT PERFORMANCE, INC.,
RESORT TELEMARKETING, INC.
MARKETING, INC., THOMAS P.
McCANN, II, JAMES F. WEILAND

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EXHIBIT 1



IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE	§	
COMMISSION	§	
	§	
Plaintiff	§	
	§	
vs.	§	NO. 87 C 6776
	§	
AMY TRAVEL	§	
SERVICE, INC.	§	
INC., RESORT	§	
PERFORMANCE, INC.,	§	
RESORT TELE-	§	
MARKETING INC.,	§	
THOMAS P. MCCANN,	§	
III, AND	§	
JAMES F. WEILAND	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AFTER TRIAL

Joan H. Lefkow, Magistrate:

This case is before the court on the complaint of the Federal Trade Commission ("Commission") alleging that defendants have violated section 5(a) of



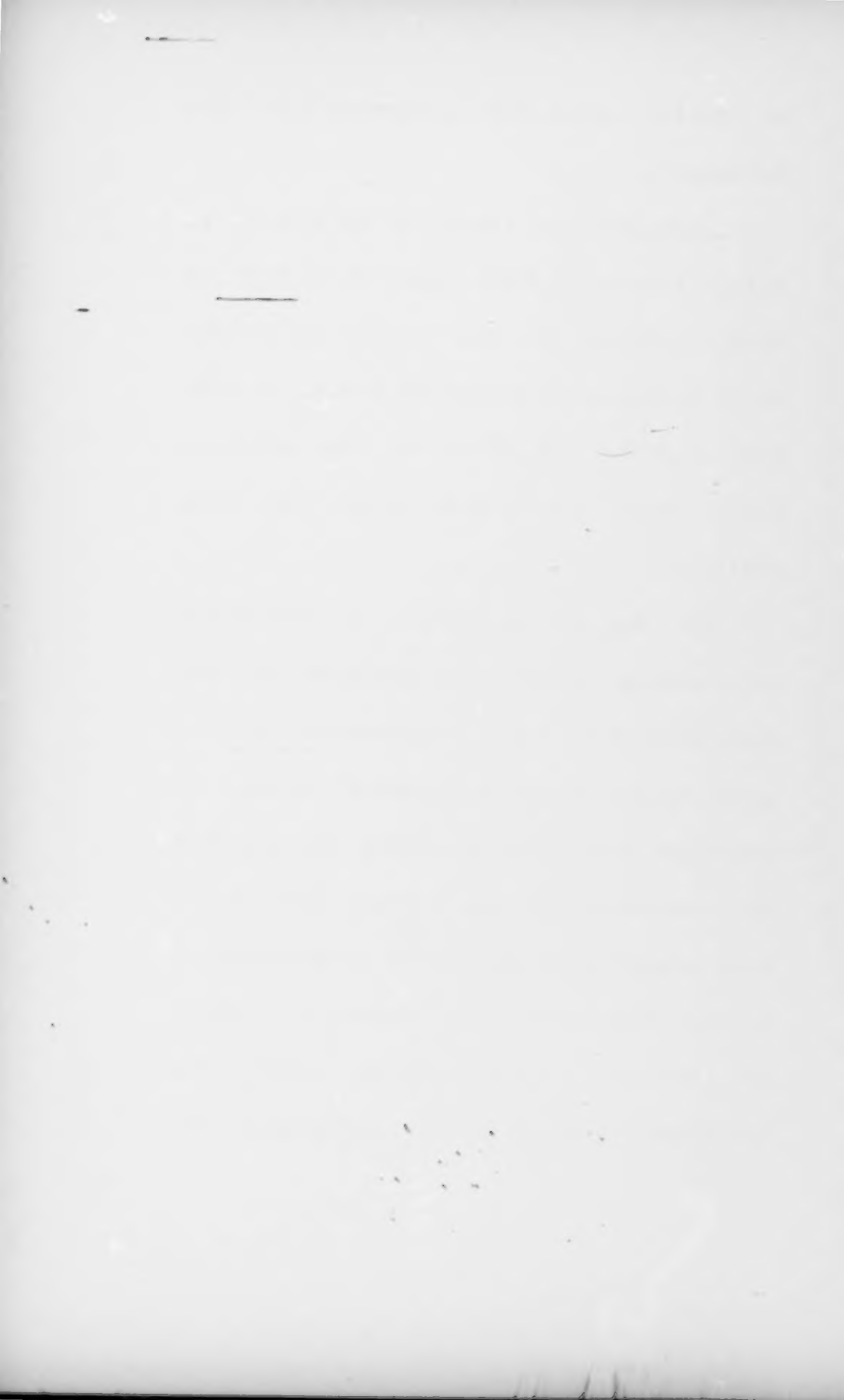
the Federal Trade Commission Act ("the Act"), 15 U.S.C. § 45(a), which prohibits unfair and deceptive practices in commerce. The Commission alleges that defendants Resort Telemarketing, Inc. ("RTI"), Resort Performance, Inc. ("RPI"), Amy Travel, Inc. ("Amy"), James Weiland and Thomas McCann, controlling principals of the defendant corporations, engaged in deceptive and unfair practices prohibited under section 5(a) in connection with their sale of contracts for vacation services, called "Vacation Passports." The Commission seeks a permanent injunction under section 13(b) of the Act, 15 U.S.C. §53(b), rescission of contracts entered into as a result of the allegedly unlawful trade practices and restitution



of monies paid by consumers to the defendants.

Jurisdiction rests on 28 U.S.C. §§ 1331, 1337(a), 1345 and 15 U.S.C. § 53(b). Venue is uncontested as proper in this district under 28 U.S.C. § 1391 and 15 U.S.C. § 53(b) on the apparent basis that the claim arose in this district.

On August 3, 1987, a temporary restraining order was entered by the Honorable Harry D. Leinenweber, which, inter alia, froze defendants' assets to preserve funds for possible restitution to consumers and restrained defendants from engaging in practices complained of in the complaint. On August 17, 1987, the temporary restraining order was "extended generally" by agreement and



the motion for preliminary injunction was consolidated with the trial on the merits. Thereafter, the parties consented to trial before a United States Magistrate under 28 U.S.C. §636(c). The matter was tried before the court December 10-17, 1987.

The complaint alleges four unfair or deceptive acts or practices committed by the defendants. Count I alleges that the defendants represented to consumers that purchasers of Vacation Passports were entitled to fully paid vacations to Hawaii and other destinations, including roundtrip airfare and hotel lodging for eight days and seven nights for a purchase price ranging from \$289.90 to \$349.90, that this representation was false, and that in fact purchasers were



required to pay substantial sums in order to obtain their vacations. The complaint alleges that defendants' false representations were a deceptive practice committed in violation of Section 5(a).

Count II alleges that defendants represented to consumers who purchased Vacation Passports that the only additional cost of the vacation package was "one standard, all year full economy (Y-class) airfare." It alleges the representation was false in that a Y-class airfare is not an economy airfare but rather is the highest price coach airfare and significantly more expensive than the lowest possible airfare generally available to the public. By couching the additional



costs in terms of "one standard, all year full economy (Y-class) airfare," defendants failed to disclose the full cost of what the consumer was buying. This was especially deceptive and unfair in light of representations made contemporaneously that consumers were buying a "[w]onderful vacation at . . . a low price", [s]pecial price vacation," "[w]onderful vacation package at such a low price", and that a "limited number" of vouchers were available "at this price." Nondisclosure of price under these circumstances, the complaint alleges, is a deceptive trade practice.

Count III alleges that defendants represented to consumers that consumers must provide defendants with their credit card numbers for the sole purpose



of verifying their eligibility to purchase a Vacation Passport, and that this representation was false because defendants obtained the numbers in order to bill charges for vacation passports to consumer credit card accounts. The complaint alleges that the false representation that the defendants wanted the credit card numbers for purposes of verification of eligibility was a deceptive trade practice.

Count IV alleges that defendants have billed charges for Vacation Passports to consumer's credit card accounts after being told by consumers not to bill their accounts; after defendants represented to consumers that they needed the number solely to verify their eligibility to purchase a Vacation

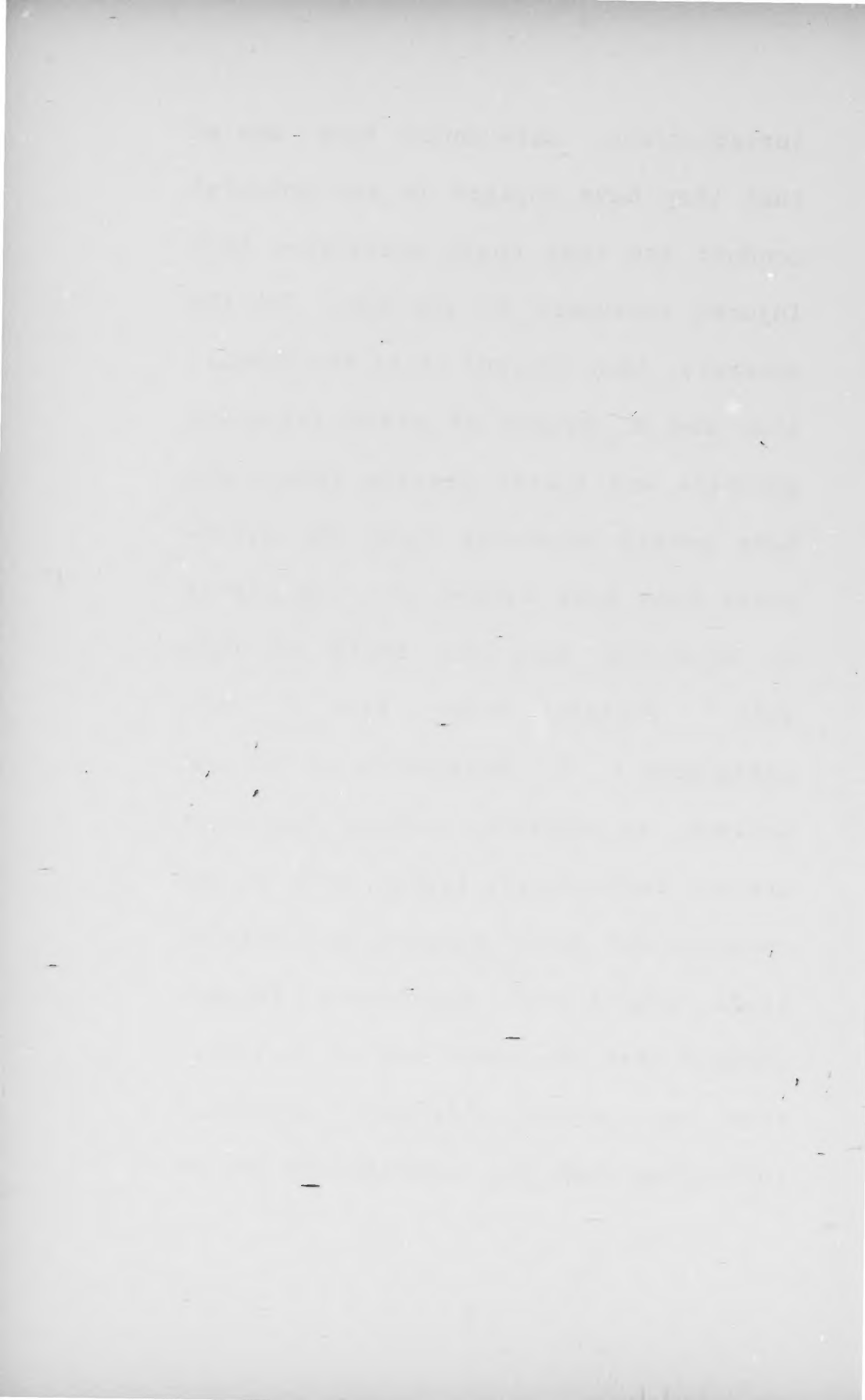


Passport; or after telling consumers that their credit card numbers would not be billed. The complaint alleges that defendants' practice of billing consumer credit card accounts without the consumers' express knowledge or consent was an unfair act or practice under section 5(a) of the Act. The complaint further alleges that the misrepresentations and nondisclosures were likely to mislead consumers and to result in injury to them and that defendants have in fact suffered substantial injury as a result of their reliance on defendants' representations, including payment of money to defendants for the Vacation Passports.

Despite injunctions and consent decrees having been entered in several



jurisdictions, defendants have denied that they have engaged in any unlawful conduct and that their activities have injured consumers in any way. To the contrary, they contend it is the Commission and a variety of state attorneys generals and Secret Service agents who have seized documents from the defendants that have caused the "occurrence or condition made the basis of this suit." Pretrial Order, Part C, subparagraphs F, G. Defendants McCann and Weiland, in addition, contend that they are not individually liable, even if the corporations have engaged in unlawful trade practices. Defendants further contend that the court has no jurisdiction to enjoin "defunct parties," indicating that ~~the~~ corporations are no



longer doing business. Id., subparagraph

A.

FINDINGS OF FACT

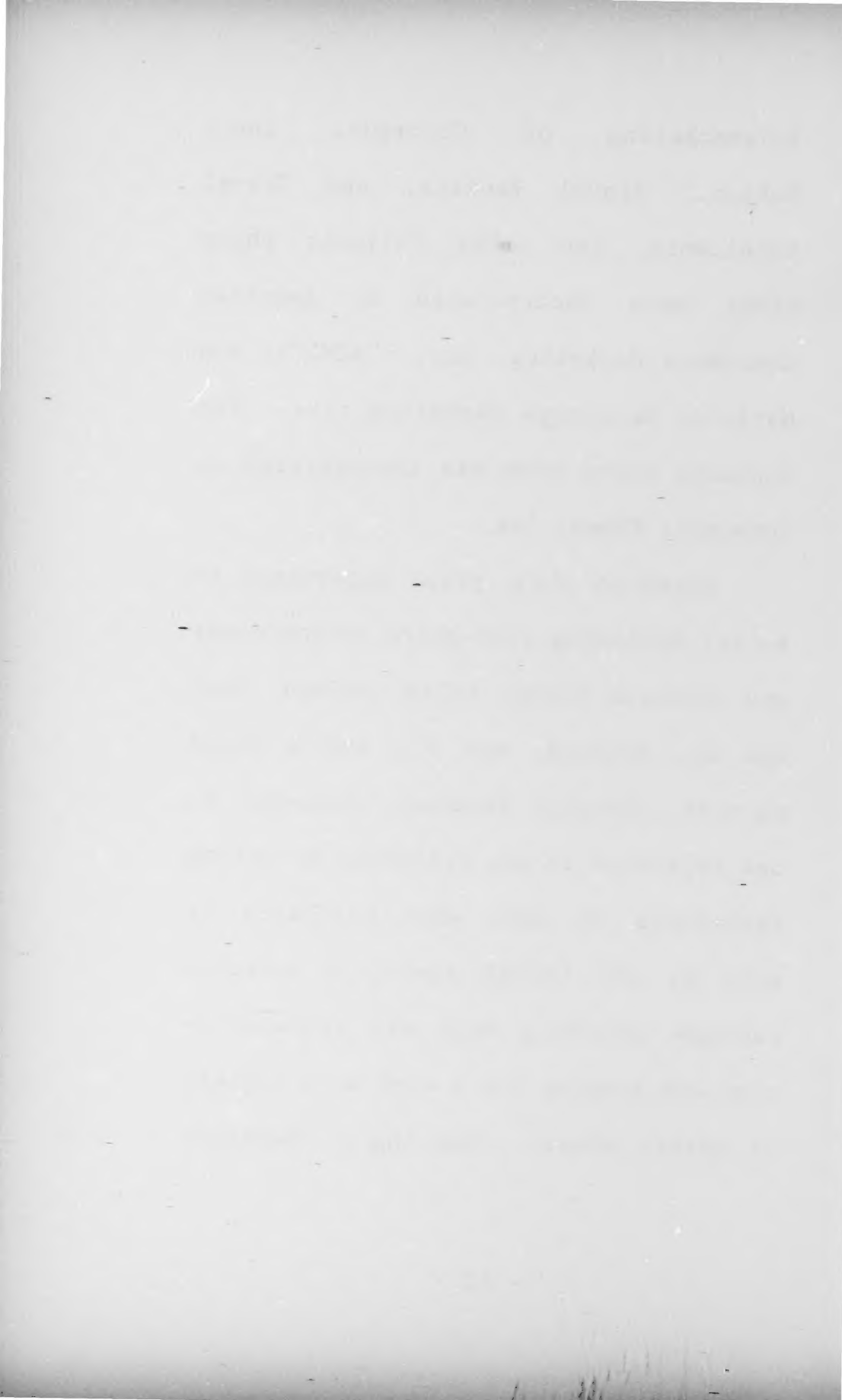
Based on the testimony received, the exhibits and depositions admitted into evidence and the stipulations of the parties, the court, having weighed the credibility of the witnesses, enters the following findings of fact:

In September, 1985, defendants Weiland and McCann incorporated RPI, an Illinois corporation, for the purpose of marketing vacation certificates. RPI is located in Naperville, Illinois. In June, 1986 defendants McCann and Weiland and two other individuals incorporated RTI, an Indiana corporation, and opened a "telemarketing" sales room in Indianapolis, Indiana, to sell "Vacation

Passports" at retail over the telephone. Within a few months, they opened additional phone sales rooms, two in Texas, three in Colorado, two in Illinois, and one in Kentucky. These corporations were wholly-owned subsidiaries of RTI. All the corporations were managed by McCann and Weiland and all operated as a single entity in all material respects. RPI held payroll accounts for the employees of some or all of the other corporations. RTI handled the billing to customer accounts resulting from the subsidiary corporations sales. The Houston phone rooms were incorporated as Resort Telemarketing of Texas, Inc. ("RTI Texas"), and Texas Communications and Travel, Inc. ("TCT"). The Colorado phone rooms were incorporated as Resort

Telemarketing of Colorado, Inc., National Travel Brokers, and Travel Excellence, Inc. The Illinois phone rooms were incorporated as American Consumers Marketing, Inc. ("ACMI"), and National Consumers Marketing, Inc. The Kentucky phone room was incorporated as Consumers Power, Inc.

Based on their prior experience in sales, including time-share condominiums and vacation travel sales, McCann, then age 25, Weiland, age 27, and a third partner, Cecilia Pradhan, intended to use telephone to use telephone marketing techniques to sell what basically is sold by any travel agent, a vacation package including both air transportation and lodging for a week at a variety of resort areas. Adapting a "Vacation



Passport" that they had seen or used in prior employment, McCann and Weiland put together written materials which they called their Vacation Passport. The passport consisted of two pages of promotional material including a description of the "product" or vacation package that defendants were selling.

Several portions of the passport are involved in this controversy, so it will be stated in some detail. The passport identified RPI and Amy as the presenters. On an inside flap it listed nine resort destinations and stated,

This Passport entitles the adult holder(s) to receive two round-trip air tickets plus lodging for 8 days and 7 nights for the price not to exceed one unrestricted round-trip, standard, all-year, full-economy (Y-class) airfare. Single adult travelers are entitled to the identical benefits

for 50 per cent of the Y-class fare.

To the right of this material appeared "reservation procedures" and "cancellations." "Reservation procedures" included the purchaser's obligation to contact Amy to make vacation reservations. On the reverse of the passport appeared the caption, "Amy Travel Service Inc.," and a form permitting the purchaser to select three alternative departure dates and a destination. Finally, the passport contained "tour terms and conditions" and "our guarantee to you." This paragraph included the following language:

...Some departure points may require the purchase of first-class airfare rather than "Y" class airfare; however, AMY TRAVEL SERVICE INC. guarantees the lowest price of your itinerary or will

pay you triple the difference in cash. AMY TRAVEL SERVICE INC. reserves the right to select and/or substitute hotels due to availability of our special packages...

After a sale was made over the phone, defendants mailed the passport to the purchaser. Included with each passport was a Purchaser's Acknowledgement Agreement ("PAA"). The PAA varied somewhat from time to time and among the different corporations. One of the PAA's used at TCT is illustrative:

PURCHASER'S ACKNOWLEDGEMENT
AGREEMENT

1. With your credit card purchase of \$329.90 of the vacation passport voucher, you are entitled to receive a fully-paid vacation for two at a cost not to exceed that of one round-trip standard, all-year, full economy ("Y" class) airfare, which you agree to purchase from the travel agency named in the

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455 FIFTH AVENUE
NEW YORK, N. Y. 10018

voucher. In other words, for the cost of the one airfare, the travel agency will provide both airline tickets and 8 days and 7 nights lodging for two people, plus they do all the work. You have eight locations to choose from. They are... ACAPULCO, JAMAICA, FLORIDA, BAHAMAS, HAWAII, LAS VEGAS, COLORADO OR LONDON.

2. The travel agency's guarantee to you is: They guarantee you the lowest cost of your vacation itinerary, including both airfares and lodging for two people or they will pay you triple the difference in cash if you can find the same lodging as we offer and the same airfares for a lesser amount.
3. Your vacation passport is non-cancellable nor redeemable for cash. However, it may be transferred to another adult of your choice at no penalty. They must understand, however, that in order to take advantage of the program they must pay the equivalent of one round trip, standard, all year, full economy (Y-class) airfare.

4. Your vacation passport will be processed and mailed to you within the next few days. The travel agency will need to receive your completed travel request form at least 45 days in advance of your requested departure date. The voucher is good through _____ 19__.
5. Your point of departure will be from any major airport serving all major cities in the continental United States.
6. You have agreed to furnish Texas Communication & Travel, Inc. with the names of three referrals either before or after you have taken your vacation. Your referrals are under no obligation to purchase.
7. Do you fully understand everything I have just read to you?????
DATE: _____ REP: _____
MANAGER: _____

Plaintiff's Exhibit 7-2.

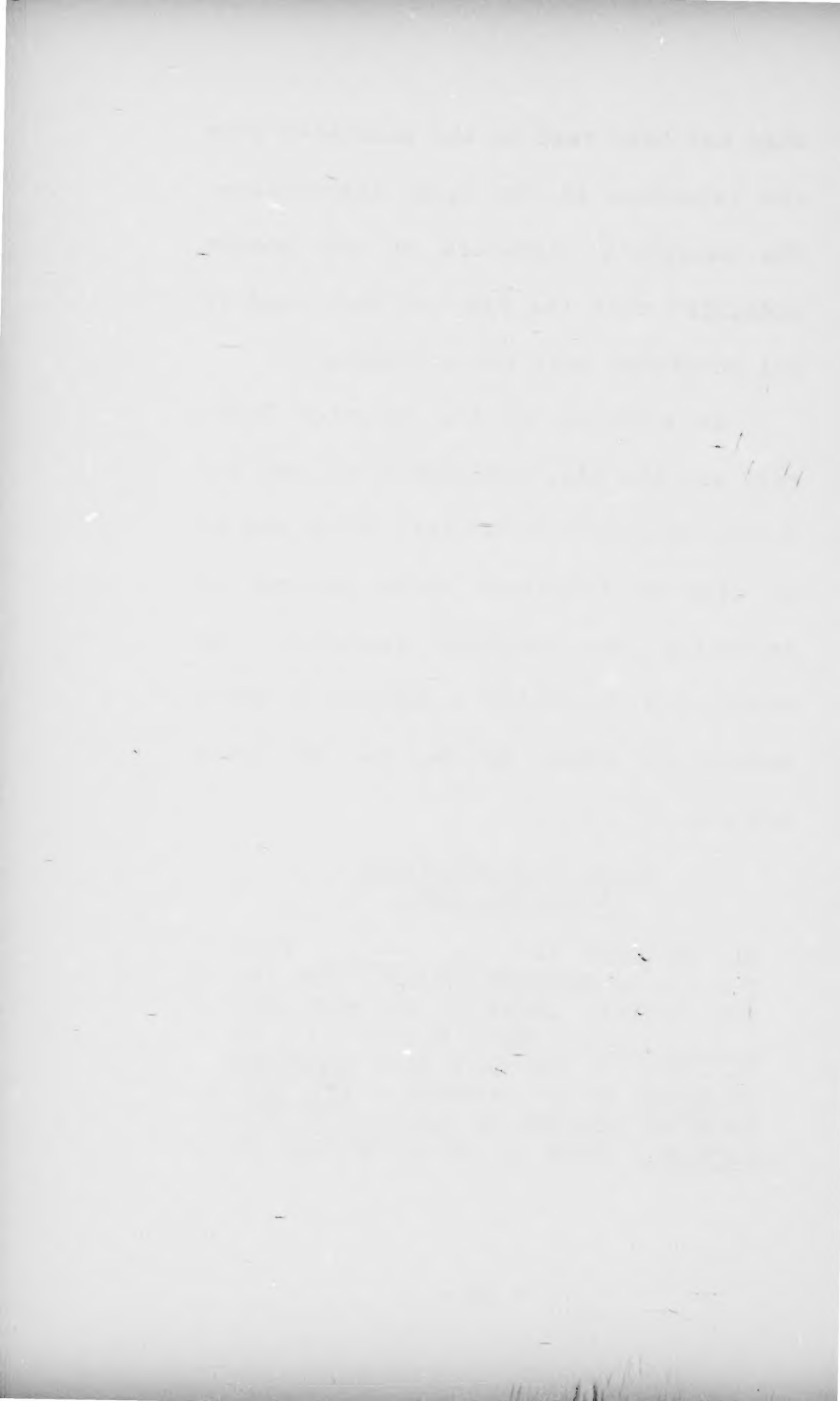
As indicated by paragraph 7, the PAA purported to be a written copy of

what had been read to the purchaser over the telephone in the sales transaction. The manager's signature at the bottom indicated that the PAA had been read to the purchaser over the telephone.

In addition to the Vacation Passport and the PAA, defendants Weiland and McCann developed a "script" which was to be used by telephone sales persons in marketing the Vacation Passport. An example is Plaintiff's Exhibit 7 which defendants admit to be one of their scripts.

TEXAS COMMUNICATIONS
& TRAVEL, INC.

HI, MY NAME IS _____ WITH
T.C.&T. OF HOUSTON, TEXAS. HOW ARE
YOU TODAY? GREAT... MR./MRS./MS.
_____, THE REASON I AM
CALLING, IS YOU HAVE BEEN COMPUTER
SELECTED TO BE OFFERED A SPECIAL,
VACATION VOUCHER TO HAWAII FOR ONLY
\$329.90. THIS IS BEING OFFERED TO



LESS THAN 1% OF ALL THE CREDIT CARD
HOLDERS IN THE U.S.

AT THAT PRICE, I'M SURE YOU'D LIKE
TO GO, HOWEVER, I DO HAVE TO ASK
SOME QUALIFYING ?S FIRST. PROBABLY
QUESTIONS: (1) WHY SO CHEAP? (2)
WHAT'S THE CATCH (3) WHAT DO I DO
TO QUALIFY?

(REGARDLESS OF QUESTIONS, THE
ANSWER IS:)

FIRST, MR./MRS./MS. _____, LET'S SEE
IF YOU QUALIFY.

1. YOU ARE 21 OR OVER, AREN'T
YOU?
2. YOU ARE STILL A MASTERCARD OR
VISA CARD HOLDER, AREN'T YOU?
3. YOU DO PLAN TO TAKE A VACATION
WITHIN THE NEXT 12 MONTHS,
DON'T YOU?
4. WHEN YOU TAKE YOUR VACATION,
IF THE ACCOMMODATIONS WERE
COMPLETELY PAID FOR, WOULD YOU
TAKE SOMEONE WITH YOU?
5. AFTER YOU HAVE ENJOYED YOUR
VACATION, WOULD YOU SEND US
THE NAMES OF # FRIENDS WHO
WOULD LIKE TO TAKE A SIMILAR
VACATION, IF THEY WERE UNDER
NO OBLIGATION?

I'M GLAD YOU SAID (YES) TO THOSE
QUALIFICATIONS ...NOW I CAN TELL
YOU WHAT WE CAN DO FOR YOU, AND WHY

WE CAN OFFER YOU THIS WONDERFUL
VACATION PACKAGE AT SUCH A LOW
PRICE.

WE HAVE TESTED THE FEASIBILITY OF
TELEPHONE MARKETING, AND THE
RESULTS HAVE BEEN SO GREAT THAT WE
HAVE BEEN ALLOWED TO CONTINUE TO
OFFER THIS SPECIAL VACATION PACKAGE
TO PREFERRED PEOPLE LIKE YOU.

MR./MRS.¹ MS. _____, FOR ONLY
\$329.90¹ YOU WILL RECEIVE YOUR
VACATION VOUCHER, WHICH ENTITLES
YOU TO A FULLY PAID VACATION FOR 8
DAYS AND 7 NIGHTS FOR (2) PEOPLE AT
A BEAUTIFUL RESORT HOTEL, PLUS 2
ROUND TRIP AIRFARES, FOR A COST NOT
TO EXCEED (1) UNRESTRICTED ECONOMY
AIRFARE.

BY USING YOUR MASTERCARD OR VISA
YOU WILL RECEIVE YOUR VACATION
VOUCHER WITHIN 7 TO 10 DAYS, OR
SOONER.

AS A PREFERRED CUSTOMER... WOULD
YOU RATHER USE MASTERCARD OR
VISA...

(SHUT UP.....) ,

¹Prices varied from \$289.90 to as
high as \$349.90.

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LIBRARY
1000 S. MICHIGAN AVE.
CHICAGO, ILL. 60607

(WHEN YOU HAVE INTEREST, READ THIS RECAP) WHAT YOU ARE PURCHASING TODAY WITH YOUR CREDIT CARD IS A VACATION PASSPORT FOR \$329.90. THIS PASSPORT ENTITLES YOU TO 2 ROUND TRIP AIR TICKETS, PLUS LODGING FOR 8 DAYS AND 7 NIGHTS FOR 2 PEOPLE AT A RESORT HOTEL, FOR A COST NOT TO EXCEED 1 UNRESTRICTED ROUND TRIP, (Y-CLASS) FULL ECONOMY AIR-FARE.

CLOSING: WHAT IS THE EXPIRATION DATE? HOW DOES THAT # READ? OK, WHILE I'M GETTING YOUR AUTHORIZATION #, I WOULD LIKE TO HAVE MY MANAGER VERIFY EVERYTHING I HAVE SAID TO YOU.

9714 OLD KATY ROAD, SUITE 212,
HOUSTON, TEXAS 77055
12/8/86

After the script was read, the salesperson gave the phone to his or her supervisor (the T-O, or takeover), who read the PAA to the customer. Beginning in the fall of 1986, in response to consumer complaints, various state and federal law enforcement authorities

THESE ARE THE RESULTS OF THE
RESEARCHES OF THE AMERICAN
AND THE BRITISH NAVY
IN THE NORTH ATLANTIC OCEAN
DURING THE PAST FEW YEARS
AND THE RESULTS ARE
AS FOLLOWS:—
1. THE NORTH ATLANTIC OCEAN
IS A GREAT RESERVOIR OF
WATER, AND THE WATER IS
IN A CONSTANT STATE OF
MOVEMENT, AND THE RESULTS
OF THE RESEARCHES ARE
AS FOLLOWS:—

THE NORTH ATLANTIC OCEAN
IS A GREAT RESERVOIR OF
WATER, AND THE WATER IS
IN A CONSTANT STATE OF
MOVEMENT, AND THE RESULTS
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IN A CONSTANT STATE OF
MOVEMENT, AND THE RESULTS
OF THE RESEARCHES ARE
AS FOLLOWS:—

began investigating defendants' operations. In February 1987, the Attorney General of the State of Texas executed a search warrant on the premises of RTI Texas and TCT. As a result of the search, the Attorney General of Texas came into possession of a variety of typed and handwritten scripts that had been located on the desks of telephone sales persons. These were turned over to the Commission for use in this case. Many of the typewritten scripts contained basically the same format as Plaintiff's Exhibit 7, and the evidence supports the inference that these emanated from McCann or his managing agents. Plaintiff's Exhibit 2, for example, starts out:



Hi. My name is _____, I'm calling you with T.C.&T., I'm calling from Texas. This is not a sales call so please relax. The reason I am calling Mr./Mrs./Ms. _____, is this, you have been computer selected through a major credit card company to be offered a fully paid vacation to Hawaii, for only \$289.90. *** We are testing the feasibility of telephone marketing for an INTERNATIONAL TRAVEL AGENCY. While we are doing this pilot program, they have given us a VERY LIMITED AMOUNT OF THESE SPECIAL priced vacations to offer.

McCann admitted that the "this is not a sales call" line had been used but that he ordered it dropped. At his deposition, however, McCann said he let it be used because he saw nothing wrong with it. It was also conceded that no limit on the number of passports existed. Plaintiff's Exhibit 24 was similar to the above scripts but added at the close of the first paragraph, "This is being



offered to less than 1% of ALL the credit card holders in the U.S. At that price, you would like to go, wouldn't you?????"

Sales persons were instructed to follow the script and were given canned answers for recurring questions. With respect to an objection of a prospective purchaser to giving out a credit card number over the telephone, defendants had a prepared script intended to reassure. The response included the statement, "... we contact MC/VISA to verify [sic] your credit ... If we misused any credit card number, not only would we lose that merchant number [with MC/VISA] but no doubt, our bank would freeze our account for a complete audit



of all business on MC/VISA." Plaintiff's Exhibit 23-5.

Robert W. Werner, then serving as law clerk to United States Supreme Court Justice Lewis H. Powell, Jr., testified at trial that he had received a call from RTI Texas on December 17, 1986. The salesperson identified herself as Tina Jacobs. Werner testified that Jacobs told him that he had been selected by computer to receive a fantastic discount vacation. Specifically, he could obtain a full roundtrip expense paid trip for seven days and eight nights to Hawaii for \$329.90 with the condition that he also pay for a second roundtrip economy fare ticket. Werner expressed concern about whether he would be able to use the passport by



the expiration date, November 30, 1987. Jacobs told him the date could be extended and that he could obtain a refund if he changed his mind. Werner gave Jacob his VISA card number and Jacob's "manager," identified as Wes Sanders, came on the telephone. He recited the PAA, including the term that the purchase was not refundable. Werner questioned that term based on his prior conversation with Jacobs. Sanders reassured him that a refund was possible, that the term was included in the PAA to discourage people from asking for refunds. He also assured Werner that extensions were freely granted beyond the expiration date. Werner received the Vacation Passport and PAA a few days later. On reflection he

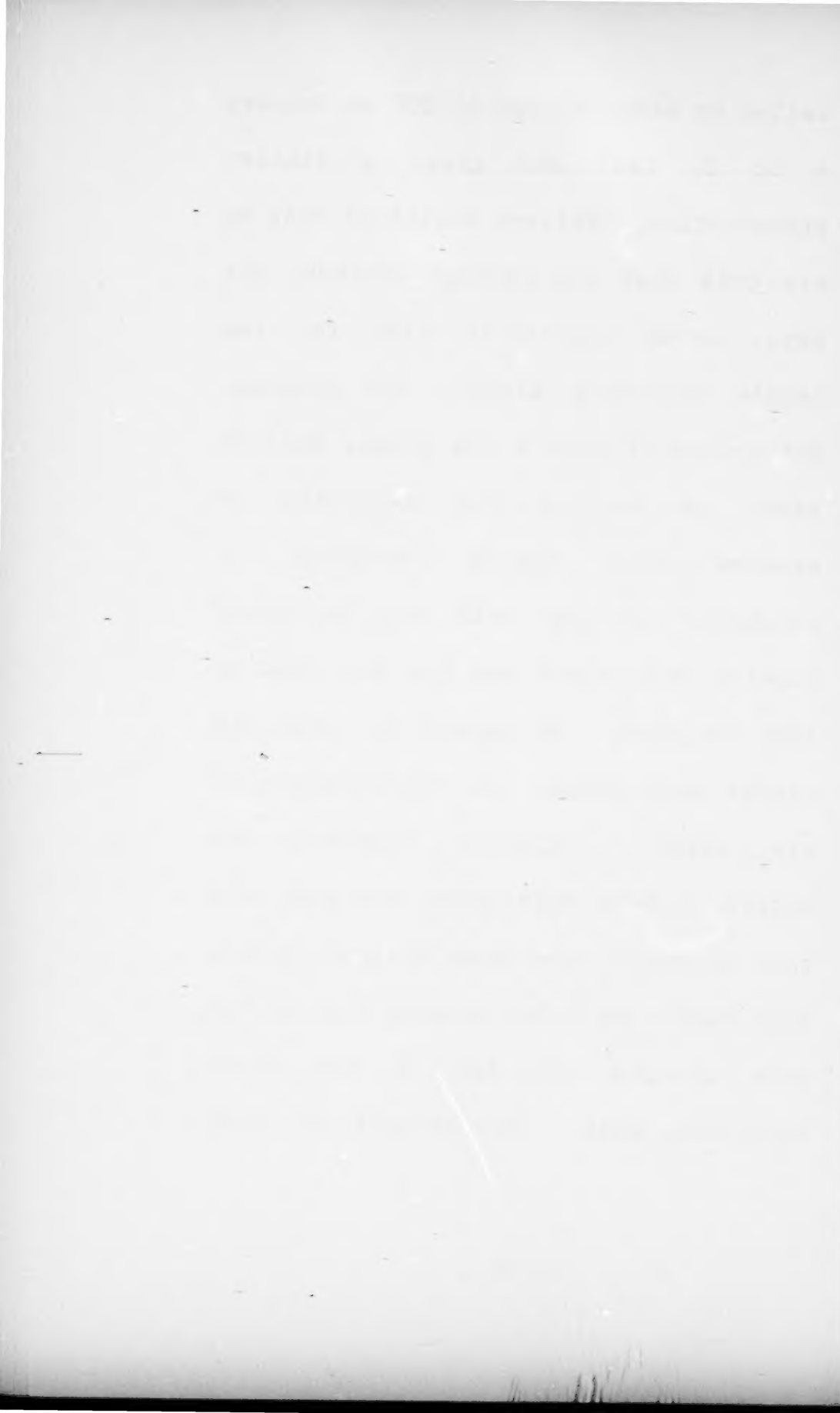


decided to cancel. He sent a letter on 12/29 to RTI Texas requesting a refund. Having received no response by January 28, 1987, Werner called a customer service number and requested a refund. He was told his refund would be processed by January 31 and that he would see it reflected in his account in 30 to 60 days. On February 13, not having information of a refund, Werner called again and was told to call back. He called again on March 23 and was told that all representatives were busy, they would call him back. On March 24, Richard Hall called him back and assured Werner that he personally would see that Werner's refund was processed. He did not receive a refund. On April 22, Werner called again and learned that

Hall no longer was employed there. He called two more times that day. During his last telephone conversation he was told that RTI Texas was under investigation and that their funds had been frozen for 90 days, but as soon as the freeze was lifted his refund would be sent. Werner asked for a letter confirming his right to a refund. Although he was told the letter would be sent, Werner did not receive such a letter and did not receive a refund. Werner understood during the sales conversation that he would have to purchase an additional fare but he did not understand at the time the economic consequences of the agreement.

Perry Whitson, a realtor from Edmund Oklahoma, testified that he was

called by Henry Sledge of TCT on January 4 or 5, 1987 and given a similar presentation. Whitson testified that he was told that the package included six days, seven nights in Oahu for two people including airfare and lodging. Suspicious of such a low price, Whitson asked to receive the materials to examine them before deciding to purchase. He was told that he would receive the packet and had ten days to look it over. He agreed to give his credit card number for verification of his credit. Whitson received the materials some days later and was told that he might have been charged on his VISA card. He later learned that he had been charged the day of the first telephone call. On January 6, 1987



Whitson wrote a letter to TCT cancelling "whatever business relation you think we have." He recited that Henry Sledge had told him "of a trip to Hawaii for \$329.90, my pick of hotels from your list, plus two airfares," and that Sledge's supervisor Jean Gordon had confirmed this. Later in the letter he insisted that he had been told to give his credit card number for a credit check only; "nothing was ever discussed about a charge being made." Whitson made a request for a credit from his VISA cardholder bank and this was done. Whitson, therefore, lost no money other than his telephone calls, postage and related expenses.

Bob Simonello, of New York, who described his occupation as "producing



multi-media industrial shows" and who holds a BS degree in advertising, testified that he had been called by Amy or an affiliate on January 2, 1987. He testified that he was told that he was offered a vacation package for two to a number of places including Florida, Hawaii and Acapulco for \$329.00. This amount included air travel and accommodation for a week. Questioning the low price, he inquired, "Are you saying I can go to Hawaii with a friend for no additional cost?" and the caller responded yes. The caller also assured Simonello that he could cancel within 30 days. The caller also assured Simonello that he could cancel within 30 days. Simonello agreed to give his credit card number over the telephone. When



Simonello received the vacation passport and materials, he believed that it did not describe what had been told him over the telephone in that it was not a package for two persons but rather he would have to buy a "Y-fare" additional ticket. In addition he was required to give names of three people who might be interested in the trip and Simonello objected to doing that. Simonello placed a telephone call to the number listed on the materials and stated that he wanted to cancel. He was told that he could not. After a number of telephone calls attempting to cancel, Simonello spoke with Lou Gowen. After he stated that he had reported the incident to the attorney general of New York, Gowen agreed to cancel and wrote a

letter confirming that his purchase had been cancelled. Nevertheless, Simonello has not yet received a credit on his charge account.

James Hooper of Avon, New York, a seventh and eighth grade math teacher, testified that he was called by RTI in October 1986. Hooper testified that the salesperson offered him a travel package for \$289.00 which included airfare and hotel accommodations for two to a variety of destinations. Because Hooper was in a hurry to leave at that time, he asked that the materials be sent to him for review and the caller agreed. The caller also asked for his credit card number to check his credit. Hooper gave her the number. In a few days Hooper received the materials and examined them.

Letter to the Hon. the President of the United States
Washington, D.C. 20540
Dear Mr. President:

I am writing to you today to express my deep concern
and disappointment over the recent actions of the
Federal Reserve Board. I am particularly troubled
by the decision to raise the discount rate, which I
believe is a step in the wrong direction. The
economy is still in a fragile state, and such
a move could lead to increased unemployment and
inflation. I urge the Board to reconsider this
decision and to focus on policies that will
stimulate growth and create jobs. I am confident
that the American people are counting on the
Federal Reserve to act in their best interests.
Thank you for your attention to this matter.

and even then did not realize that an additional charge was required. Nevertheless, he set them aside thinking that he had until November, 1987, to accept the offer. In December 1986, however, when Hooper received his Mastercard bill, he learned that RTI had billed him. Hooper disputed the bill with the Mastercard bank but eventually paid it in order to protect his credit rating. Hooper called RTI and complained to the America Society of Travel Agents and government agencies in an effort to obtain a refund, but he has not received a refund.

Fred E. Guinn, a police officer from Virginia Beach, Virginia, testified on behalf of the defendants. Guinn testified that he received a call from

one of defendants' telemarketing corporations during the first part of February 1987. The salesperson offered a vacation voucher for a price of \$386.00. Based on the conversation, Guinn understood that he would be required to make an additional purchase and the total cost would not exceed the cost of one roundtrip Y-class airfare for one person to his chosen destination. Guinn agreed to purchase over the telephone and received the vacation voucher. He contacted Amy to make arrangements for his trip to Disney World. He also researched the price of a Y-class airfare by calling two airlines and learned that the price was \$545.00. Amy charge Guinn \$836.00 in addition to the \$356.00 he had paid for

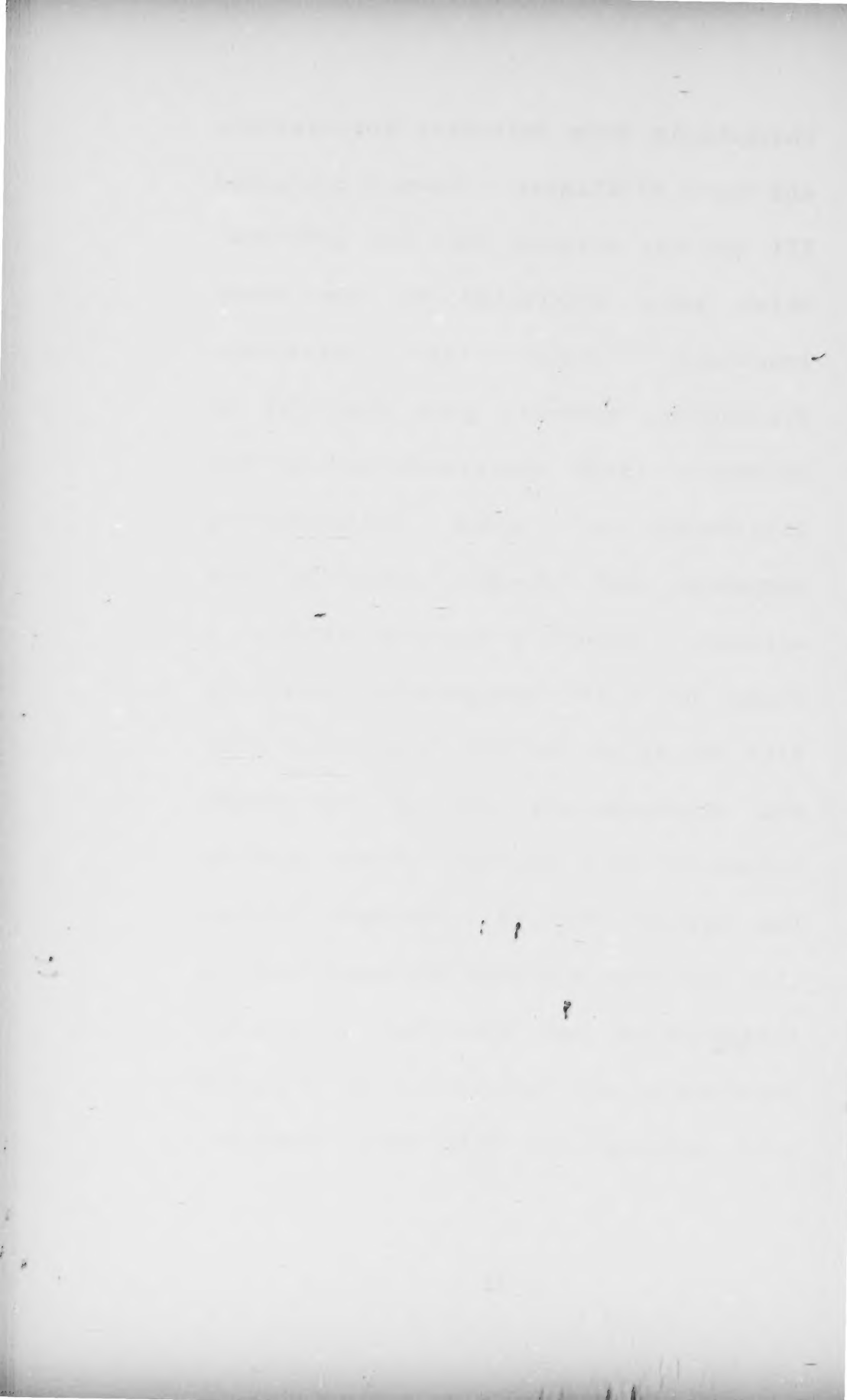
the voucher. Even though this amount was greater than the cost of a roundtrip Y-class airfare to his destination, Guinn was very satisfied with his purchase. In fact, he received a refund of \$88.03 for an overcharge which he had not even requested.

According to McCann, RTI began to receive complaints from consumers in July or August, 1986. Among the complaint letters in the record written to defendants (Plaintiff's Exhibits 201-249), the earliest is dated November 11, 1986 (Exhibit 224). These complaint letters were seized from the premises of the Texas locations which, according to McCann, were set up in late '86 or early '87.

Defendants also ran into difficulty with the banks handling their credit card transactions because of the high rate of customers disputing the charges resulting in chargebacks on the defendants' accounts. Kenneth J. Oros, an assistant vice-president for Shawmut Bank of Boston and manager of the credit card merchant department, testified in his deposition received in evidence that Shawmut Bank agreed to process credit card merchants' transactions for RPI, RTI and related companies around November 1, 1986. He testified based on his experience that a chargeback rate of approximately 3% would be normal for a telemarketing operation. By the beginning of 1987, Shawmut Bank was receiving an extraordinary number of



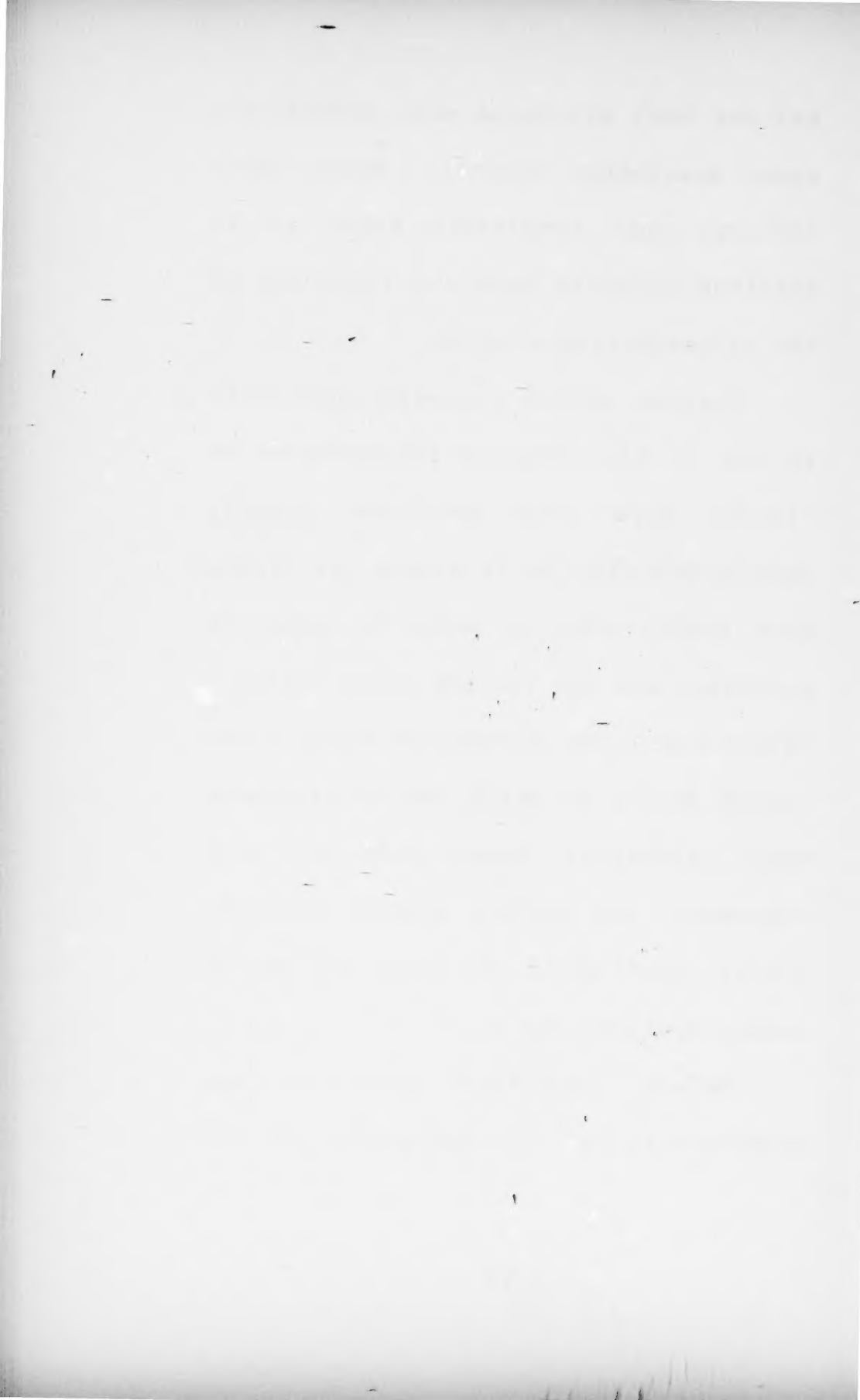
chargebacks from defendant corporations and their affiliates. Shawmut contacted RTI and was assured that the problems, which were attributed to the Texas locations, would be corrected. Eventually, however, more than 50% of Shawmut's total chargeback volume was attributed to these telemarketing companies and Shawmut cancelled the account. Shawmut's records reflect a total of 2,330 chargebacks totalling \$741,441.81 at the RTI locations. This was approximately 30% of the total volume of \$2.1 million. After opening the account for RPI, Shawmut learned that American Fletcher National Bank in Indianapolis had also had a similar experience and refused to do business with defendants. This fact, however,



had not been disclosed when defendant's agent approached Shawmut. These facts indicate that complaints began to be received promptly upon the launching of the telemarketing program.

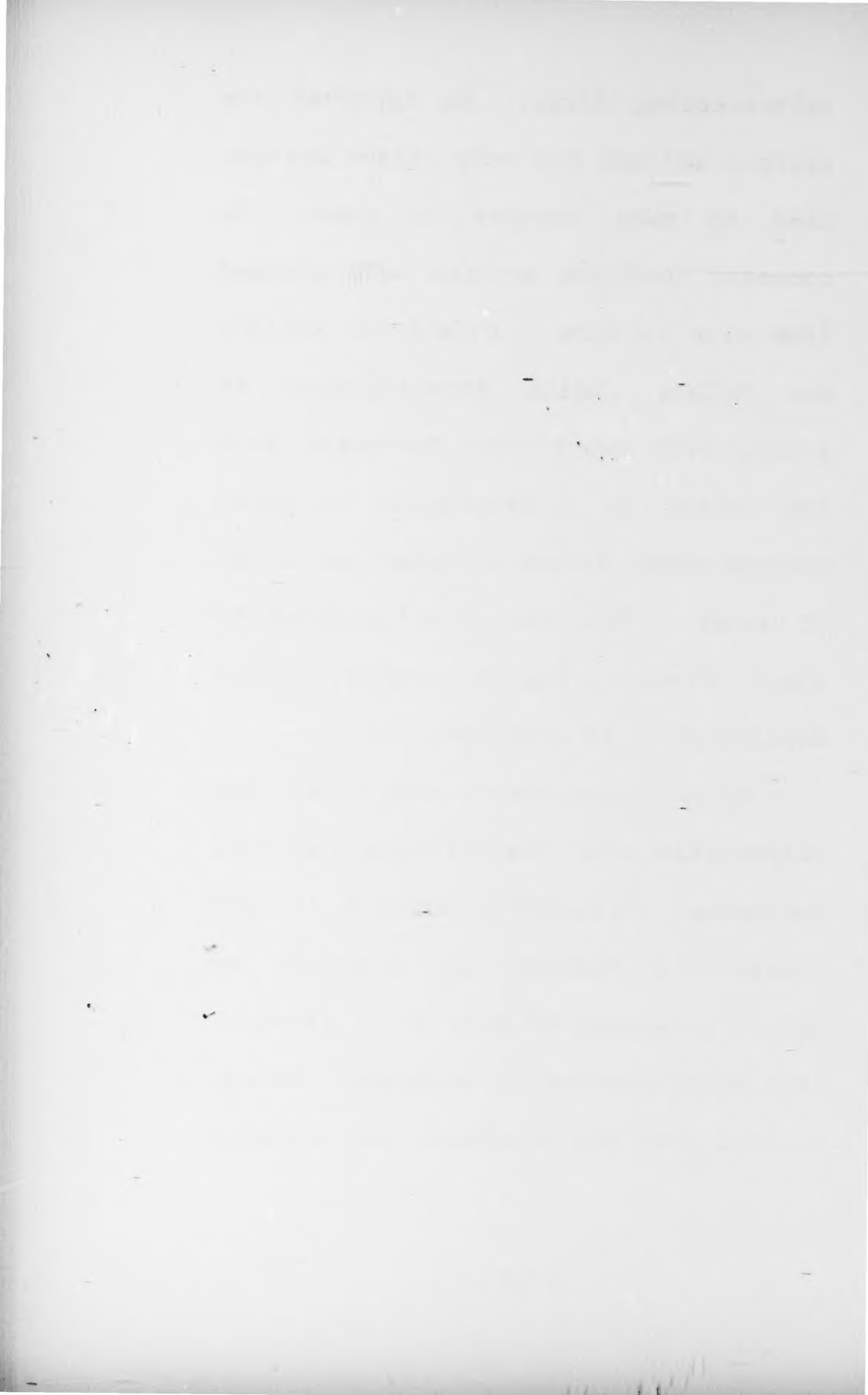
Written office policies apparently in use at RTI required salespersons to "[m]ake sure your purchaser clearly understands that he is giving his credit card number only in order to make the purchase, and not for any other reason." Nevertheless the authorized scripts and canned answer to which the salespersons were ostensibly bound made no such statement, but rather stated that the credit card would be used to verify credit availability.

McCann testified that he was responsible for all operations of the



telemarketing firms. He approved the scripts and was the only person authorized to make changes in them. He conceded that the scripts were changed from time to time. Defendants Weiland and McCann, being knowledgeable in sales, were aware that deviation from the script is a temptation to sales persons whose income is based on volume of sales. This was also conceded by their witness Eugene Staley, whose deposition is in evidence.

McCann conceded that he was responsible for the official scripts including Plaintiff's Exhibit 7 and Plaintiff's Exhibit 3, although he denied knowledge of many of the scripts that were received in evidence. He explained that his attorneys had reviewed



and approved the script material before it was put into use. Despite his admission that defendant corporations began receiving complaints in the fall of 1986, McCann contended that it was not until after the "raid" in February, 1987 that his companies began having problems with complaints. This is not borne out, however, by the governmental investigations and the complaint letters obtained from defendants' files which predated February, 1987. Defendants have also complained that the FTC and other law enforcement authorities put them out of business by freezing all their assets. Although it is true that assets have been seized, defendants have pointed to no restraint on their ability to use funds to make refunds to consumers.

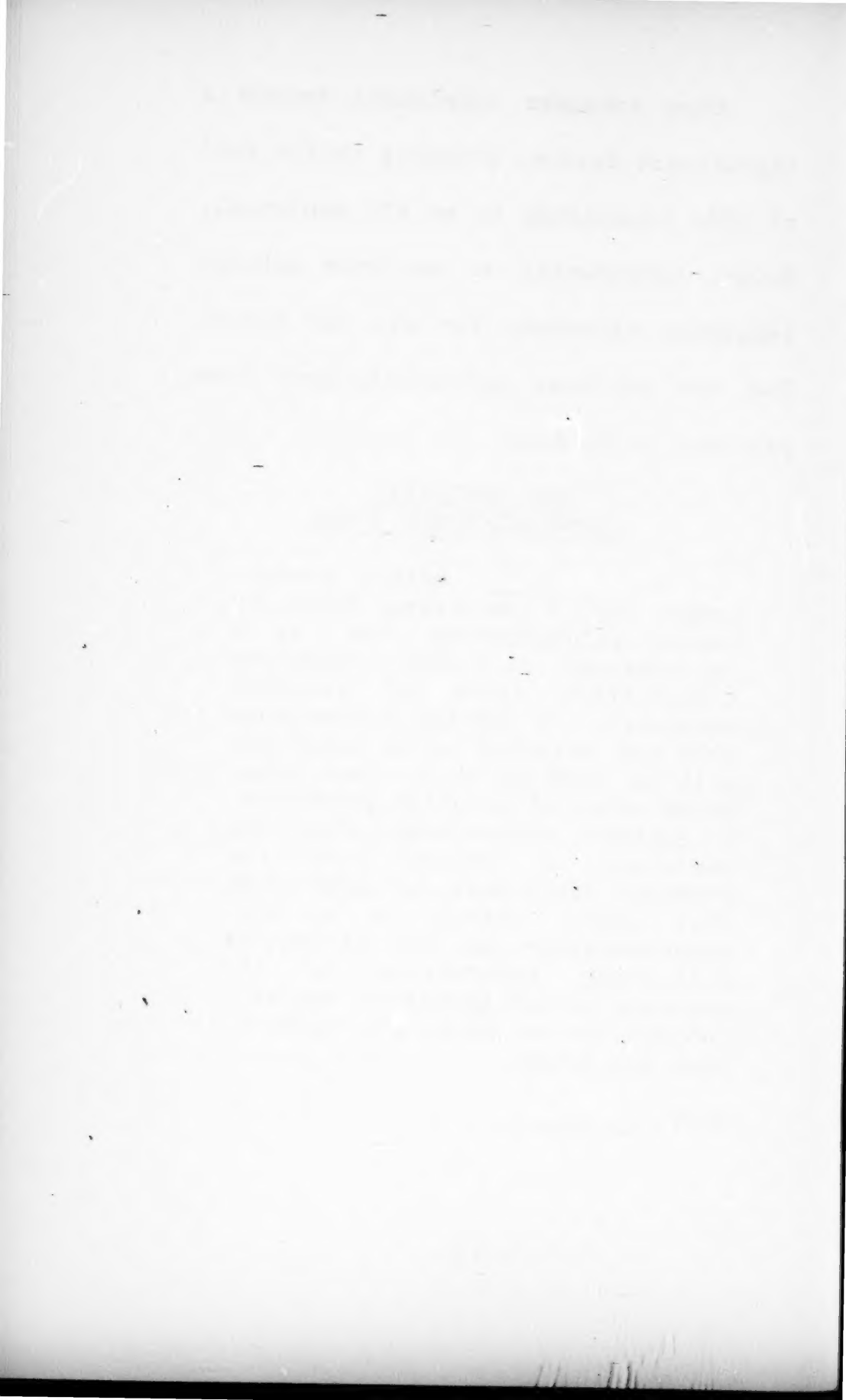


Once consumer complaints became a significant factor, probably in the fall of 1986 (according to an RTI employee), McCann implemented an employee acknowledgement agreement for all new hires. The new employee acknowledgement form provided as follows:

NEW EMPLOYEES
ACKNOWLEDGEMENT FORMS

I, _____, hereby acknowledge that I am being hired by Resort Telemarketing, Inc. as a salesperson to make telephone solicitation sales of vacation passports. I further acknowledge that the attached pitch materials will be used by me to take telephone sales of vacation passports. I further acknowledge that any deviation or change from the attached pitch material made by me that would result in a misrepresentation or the giving of misleading information to the customer is not permitted and will subject me to immediate termination for cause.

DATE: _____



Employee

A similar document was provided to supervisors. In addition, in at least some of the offices, including the Texas offices, the telephone system permitted monitoring the calls of the sales persons to determine whether they were deviating from the script. It is uncontroverted that some employees were discharged for deviations from the script, although defendants did not name any names or indicate that records were kept to document this testimony. McCann also implemented a procedure to verify the sales before the credit card authorizations were transmitted to the bank. This process, according to the



deposition testimony of Janie Blair, office manager for RTI, involved telephoning the purchaser and reading the PAA again to him or her over the telephone.

Despite these efforts, the evidence is overwhelming that deviations from the script occurred on a regular basis. The seizure of documents by the Texas Attorney General yielded numerous handwritten scripts with substantial deviations from the official script. These documents were seized from the desks of sales people, so it is inferred that sales persons were in fact deviating from the official script to a substantial degree. For example, Plaintiffs Exhibit 11 bears the name D. Bill and reads:



"HI, MY NAME IS _____, I'M CALLING FROM RTI IN HOUSTON, TX. THE NATURE OF THIS PHONE CALL IS TO INFORM YOU THAT YOU HAVE BEEN SELECTED TO RECEIVE A 'FULLY' PAID VACATION FOR TWO PEOPLE TO HAWAII OR ONE OF 7 OTHER LOCATION FOR 8 DAYS AND 7 NIGHTS IN A FIRST CLASS HOTEL ACCOMODATIONS FOR TWO PEOPLE ROUND TRIP AIRFARE AS WELL AND THE TOTAL COST OF THE PKG IS ONLY \$329.90 TOTAL."

Joseph T. Soltis, Jr. and Charles Kennedy, through testimony concerning their work for ACMI, lent credence to the evidence that deviations occurred. Soltis was a telemarketer there from July 3, 1987 through July 30, 1987. He reported that the official scripts changed at least five times while he was there. He admitted that he had deviated from the script in order to make sales and he believed that supervisors had



overheard him doing so without reprimanding him. He never heard a supervisor reprimand any telemarketer for deviating from the script although he observed it as a common practice at ACMI. Kennedy similarly testified that he worked for ACMI from July 26 through August 3, 1987. He also testified that official scripts changed frequently. In fact, he was applauded by his supervisor for deviating from the script in order to make a sale. Kennedy testified that his supervisor, Pam Cerny, had specifically told him it was all right to "ad lib," so he changed his pitch to say "I'm going to send you to Hawaii for under \$300.00," and Cerny said that was "great." Kennedy and Soltis conceded that ACMI still owed them some money,



but the court nonetheless finds their testimony credible.

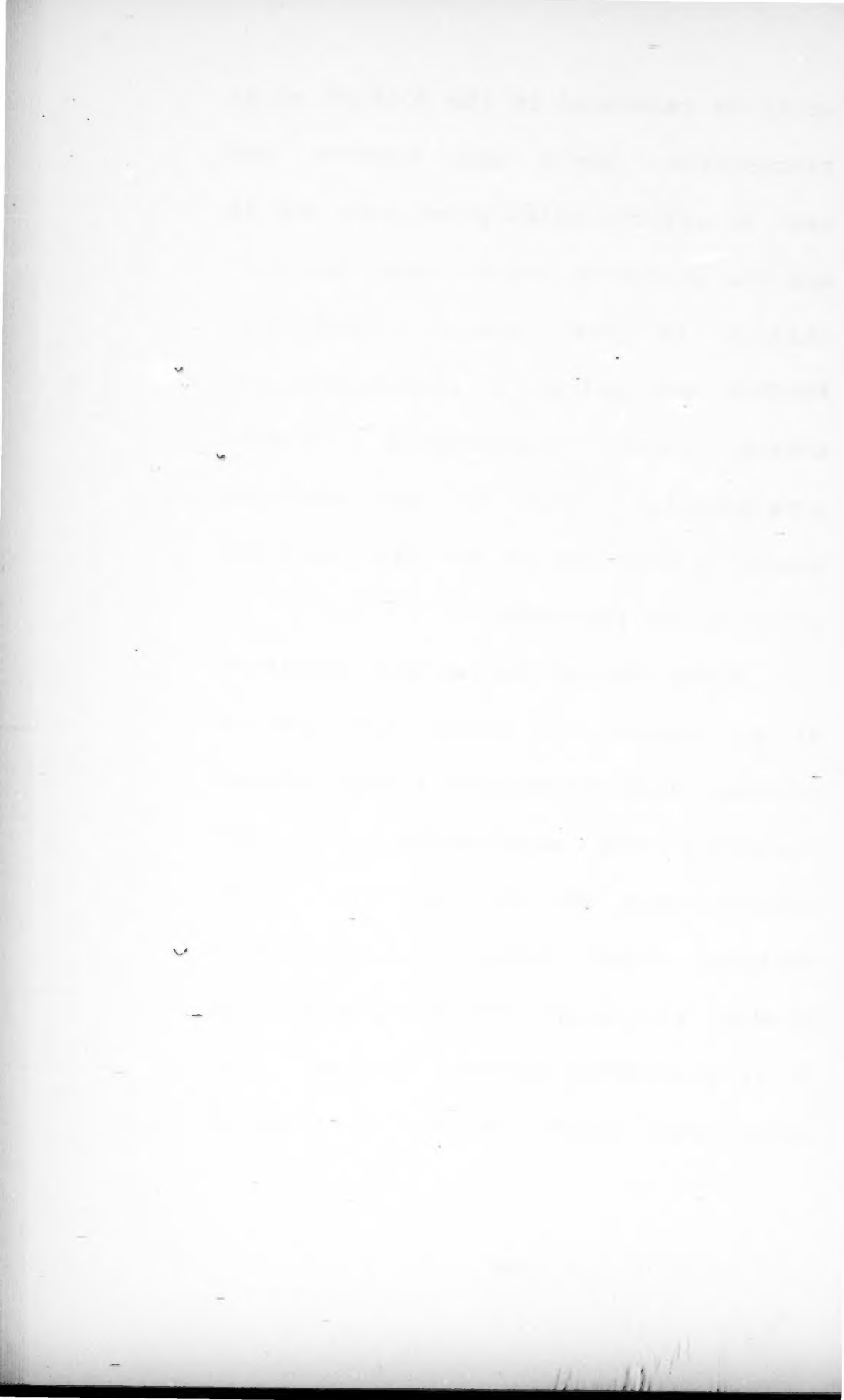
Weiland also admitted that he was directly involved in the telemarketing activities although his primary responsibility was to run Amy. He was involved in the development of the sales and promotional materials. He testified that salespersons withheld the actual price from purchasers not in order to deceive, but because the future price of any airline ticket would be unknown at the time of the sale. This, of course, is true but it is obvious that the price on the day of the sale would have been available to give the purchaser a reasonable estimate. More plausibly, as Eugene Staley, a former RTI employee conceded, revelation of price would not

have created the desired enthusiasm in consumers to purchase the passport. "It was not our business to educate the public."

Amy is an Illinois corporation also located in Naperville. Amy distributed the Vacation Passport to the telemarketing companies. Otherwise, it functioned solely as a travel agent, receiving orders for reservations and arranging trips for those who had purchased from the telemarketing companies. Amy was wholly owned by the same persons who owned the other telemarketing companies. Amy was managed by defendant Weiland and Cecilia Pradhan. Amy did not, according to Pradhan, make a profit. Rather it was intended that the companies' profit

would be recovered in the \$329.00 sales transaction. Amy's name, however, was used in all the sales promotions and it was the exclusive travel agent for purchasers to use Vacation Passports. Pradhan was primarily responsible for making and supervising travel arrangements. When an Amy employee booked a trip, he or she disclosed the price to the purchaser.

Susan Tanzman-Kaplan was qualified as an expert in travel law and in consumer understanding of travel related documents and disclosures. In her opinion, the use of the term "unrestricted round trip, (Y-Class) full economy air fare" (Plaintiff's Exhibit 7) is misleading because "economy" connotes cost saving while "unrestricted



Y-class" connotes the highest fare one can pay for a ticket under first class. In addition, in Tanzman-Kaplan's opinion, the public is not familiar with what Y-class costs. Tanzman-Kaplan also held the opinion that the use of the term voucher was misleading because voucher in the travel industry connotes a fully paid purchase so that presentation of the voucher entitles one to the product. Nevertheless, Tanzman-Kaplan conceded that it is not misleading or unusual for a consumer to pay a fee in order to purchase a vacation at a discount price. The expert also stated her opinion that the guarantee in the PAA (of the "lowest cost of your vacation itinerary including both airfares and lodging for two people, or they will



pay you triple the difference in cash if you can find the same lodging as we offer and the same air fares for a lesser amount") was misleading because it communicates that Amy will guarantee the lowest price to get to a destination, but in fact it limits the purchaser's cost to a Y-fare which would normally be a relatively high price. It was Tanzman-Kaplan's opinion that the failure to disclose the price of the vacation was deceptive. Tanzman-Kaplan also believed that the material was deceptive because it is not clear whether the \$329.90 could be deducted from the Y-class "cap" on the price.

Unrebutted evidence offered by the Commission reveals that the offer was not a bargain. The affidavit of Phillip



G. Davidoff of the American Society of Travel Agents recites that on April 28, 1987 the roundtrip Y-class fare from Washington, D. C. to Honolulu was \$1,936, but a vacation package to Waikiki for two including airfare and accommodations for seven nights was available that day for \$1,198. In light of this, the passport was of little if any actual value.

Alexander Anolik testified for the defendants. As a qualified expert on travel law and travel related services, Anolik gave the opinion that the placing of the cap of a Y-class airfare in the context of the script and the PAA was not deceptive, particularly in light of market conditions since recent general deregulation of the travel industry by



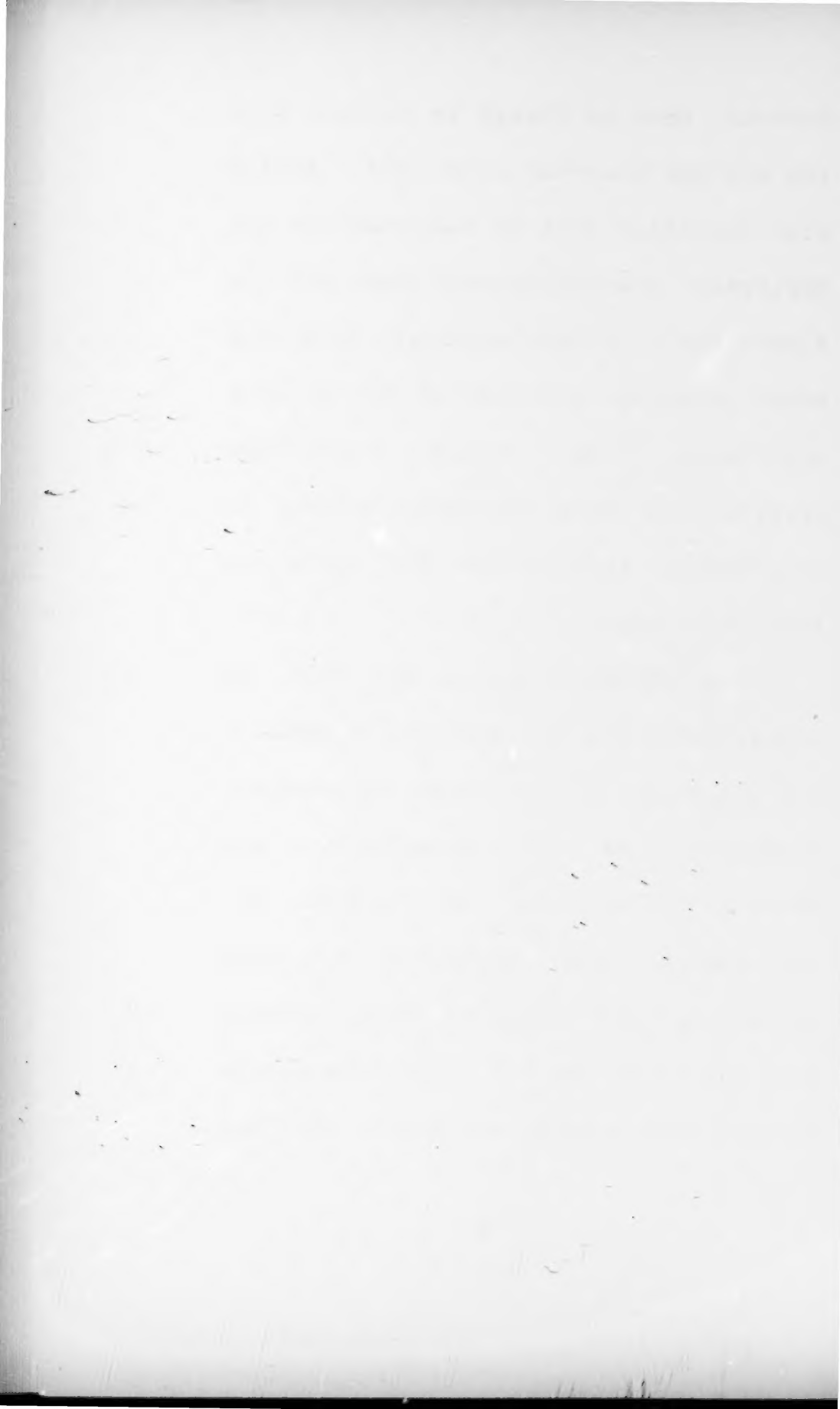
the Civil Aeronautics Board. Print advertisements with similar "come-ons" were received in evidence as examples of advertising technique being used now that were not used prior to deregulation.² In substance, the court interprets this testimony to suggest that since deregulation, more and more travel marketers are using techniques such as RTI's, and therefore the public would not be deceived because it is now educated to be wary. Anolik conceded,

²For example, defendants' Exhibit 3 is an advertisement by a bank urging the reader to open a charge account with a restaurant chain. Among the benefits was a "2-for-1 flight certificate," good for one free roundtrip ticket when a full-fare, roundtrip coach ticket on Midway Airlines is purchased."



however, that no change in section 5 of the Act has occurred since 1938. Anolik also testified that he had examined the employees' acknowledgement form and the supervisor's acknowledgement form and other personnel policies of RTI and its affiliates. He stated that the restrictions were extremely strong in threatening termination for deviation from the script.

The affidavit of Jo Ann Chin, an investigator for the division of marketing practices in the Bureau of Consumer Protection of the Commission, was received in evidence. Chin states that she analyzed the complaints that were seized by the Texas attorney general from RTI Texas and TCT. These materials reflect that between October 4, 1986 and



February 1, 1987 RTI Texas' sales were \$2,066,414 and TCT sales were \$1,590,925 based on total weekly sales figures. She also stated that defendants' own files contained approximately 2,000 complaints. She analyzed 518 of those complaints to ascertain the nature of the complaints made to the company. Her analysis revealed that 54 complained that they had not been told of the requirement to purchase an additional ticket or were told that the cost of the voucher represented the second ticket. Forty-three complained that the Y-class cost of the required ticket was misrepresented or excessive compared to other class tickets. One hundred thirty-two consumers complained to



defendants that they had never authorized charges to their accounts.

On May 5, 1987 the district court of Harris County, Texas (Cause No. 87-015621) entered a final judgment by consent without an admission of liability on the part of defendants against RTI Texas, TCT, RTI, RPI, Amy, McCann and Weiland. The judgment enjoined the defendants from engaging in, inter alia, using any phrase in the sales pitch that would lead the consumer to believe that the purchase of a travel certificate would entitle a consumer to a trip without further cost; stating that a travel certificate entitles a consumer to purchase the trip at a cost not to exceed one full coach airfare in addition to the cost of the certificate;



using the term "economy" when referring to the airfare that a consumer must pay to purchase a trip; stating that a limited number of certificates were available if such is not the case; making charges on any consumer's credit card without telling the consumer that the charge will be made the same day; processing a charge to a consumer's credit card on the representation that (a) material would be sent to the consumer for approval and that no charge would be made until the consumer had reviewed the material; (b) stating that no charge would be made until the consumer chose to travel; (3) or stating that the card number is obtained to verify eligibility.

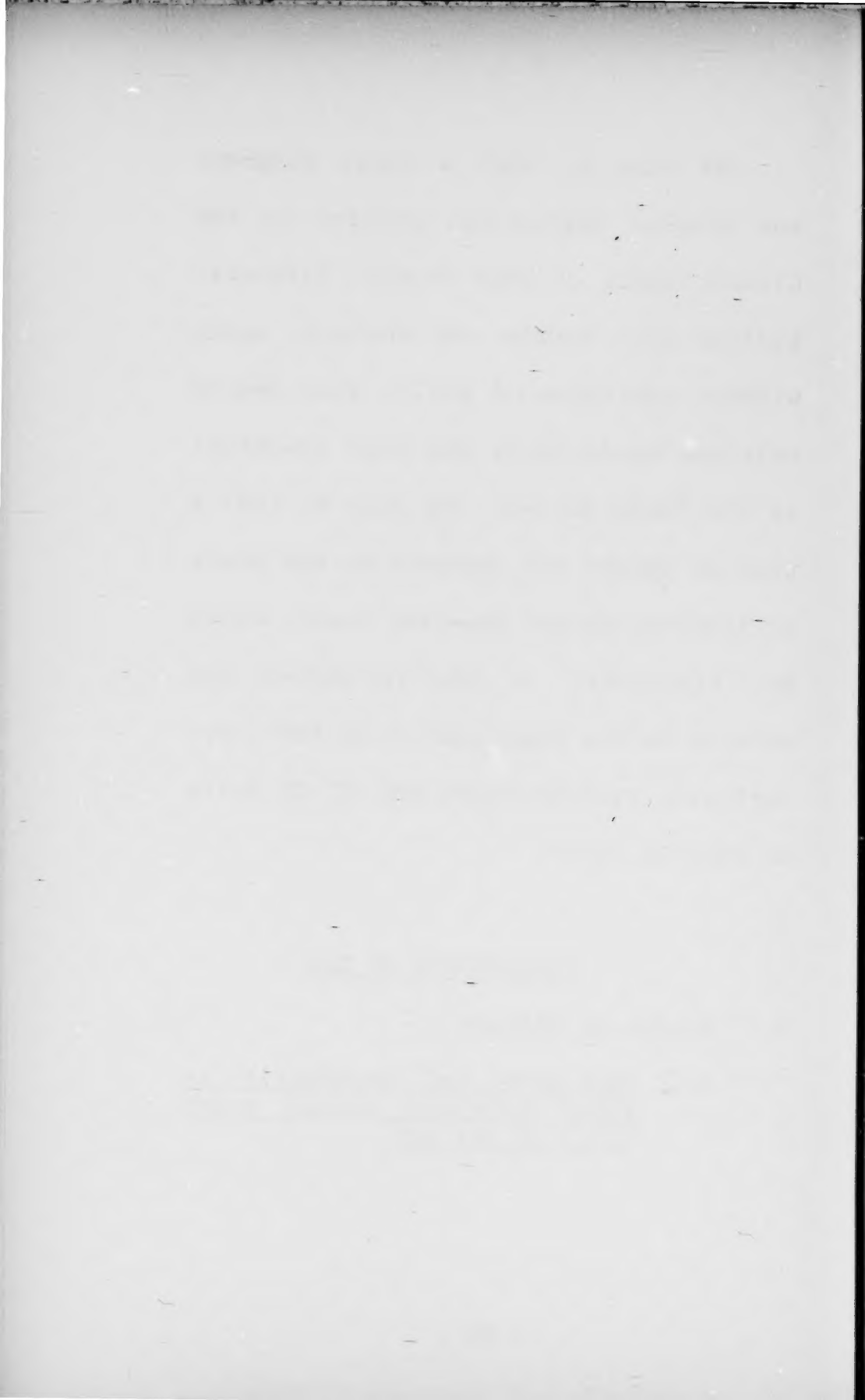


On June 1, 1987 a final judgment and consent decree was entered in the Circuit Court of Cook County, Illinois, against Amy, McCann and Weiland, again without admission of guilt, this decree enjoined essentially the same practices as the Texas decree. On July 9, 1987 a similar decree was entered in the State of Indiana, Marion Superior Court, Cause No. S787-0701. A similar decree was entered in the Commonwealth of Kentucky, Jefferson Circuit Court No. 87 CI 06118 on July 28, 1987.

CONCLUSIONS OF LAW

I. Motion to Dismiss

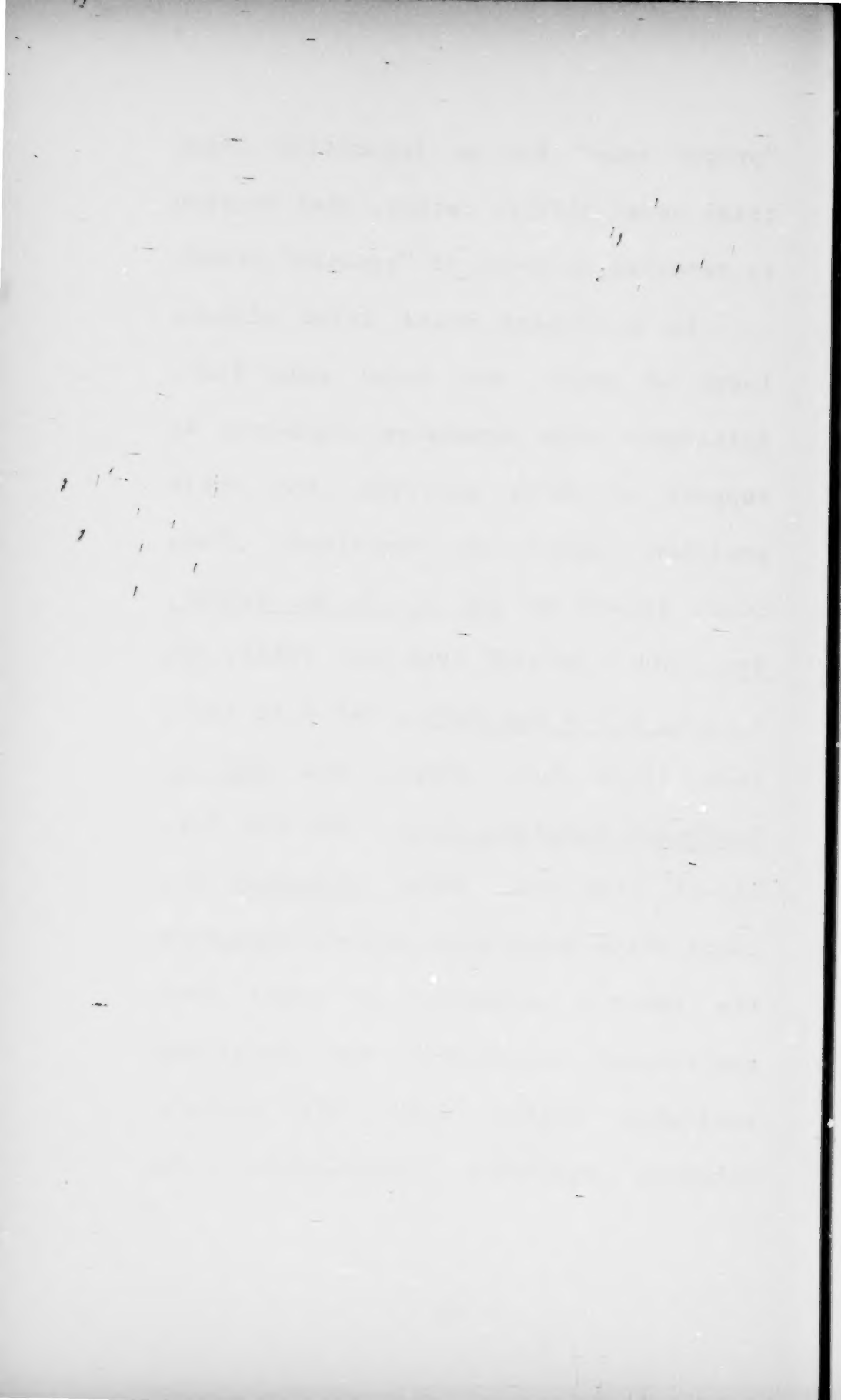
- A. This court had jurisdiction to enter temporary relief under 13(b) of the act.



On the eve of trial defendants moved to dismiss the complaint under Rule 12, Fed.R. Civ. P., for lack of jurisdiction and for failure to state a claim, and to vacate the preliminary injunction entered on August 3, 1987. Defendants contend that the court has no jurisdiction under section 13(b) of the Act, 15 U.S.C. § 53(b), to grant temporary injunctive relief. They also contend that even after trial the court lacks jurisdiction to grant anything other than an injunction. The court may not, they argue, order rescission of contracts, restitution to consumers, a freeze on all defendant's assets, or the imposition of personal liability against defendants McCann and Weiland. Defendants also argue that this is not a

"proper case" for an injunction after trial under §13(b); rather, that section is reserved to cases of "routine" fraud.

In a 37-page brief filed without leave of court, see Local Rule 9(d), defendants make expansive arguments in support of their position, but their position cannot be sustained. This court relies on FTC v. H. N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982); FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984); and FTC v. Southwest Sunsites, Inc., 665 F2d 711, 717-19 (5th Cir. 1982) (Sunsites I), cases which defendants concede recognize the court's authority to grant both preliminary injunctive and ancillary equitable relief under the court's inherent equitable jurisdiction. In



light of Commodities Futures Trading Commission v. Hunt, 591 F.2d 1211, 1219-2 (7th Cir. 1979), addressing this "identical question"(defendants' characterization) in examining a similar provision in a different statute, there is little doubt that the Seventh Circuit would agree with the Fifth, Ninth and Eleventh Circuits on this issue. See also FTC v. American National Cellular, Inc., 810 F.2d 1511, 1514 (9th Cir. 1987); FTC v. Engage-A-Car Services, Inc., slip op., No. 86-3758 (D. N.J. Dec. 18, 1986) (Westlaw FABR-CS Library); FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1296 (D. Minn. 1985) (all cases in which the court issued preliminary injunctive relief in section 13(b) actions).

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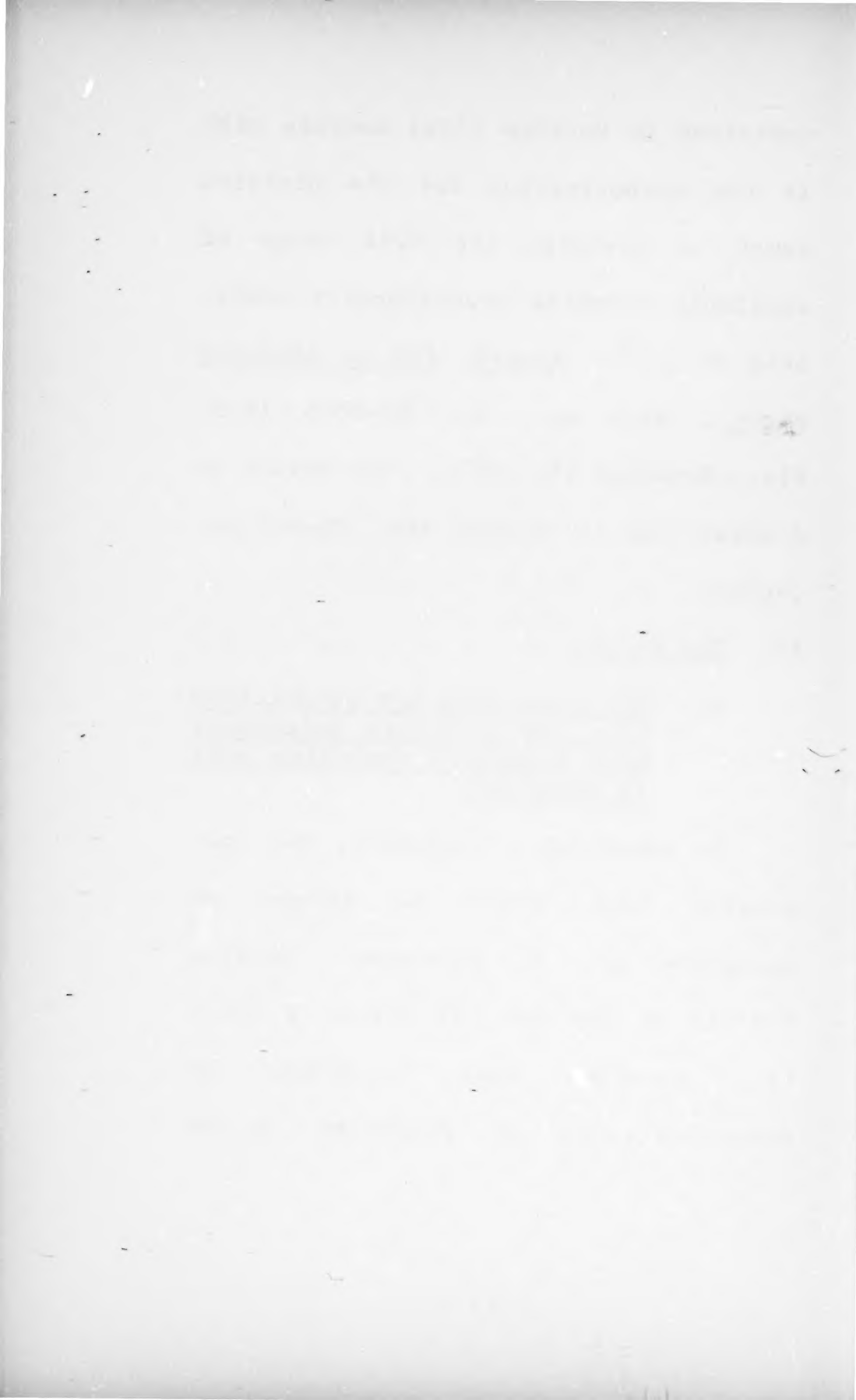
Defendants also argue that the legislative history, particularly S. Rep. No. 151, 93rd Cong. 1st Sess. 31 (1973), supports defendants' position that the district court does have the full panoply of equitable remedies available to it. The court does not find such a meaning in the legislative history and sees no authority for limiting the court's equitable powers here. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, a full scope of that jurisdiction is to be recognized and applied." Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S.Ct. 1086, 1089 (1946). See Sunsites I, 665 F.2d at 718 ("[A] grant of jurisdiction such as that

contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it.") Accord, FTC v. Atlantex Assoc., slip op., No. 87-0045 (S.D. Fla., November 25, 1987). The motion to dismiss and to vacate are, therefore, denied.

II. The Merits

- A. The Commission has established that the corporate defendants have committed deceptive acts in commerce.

To establish a violation, the Commission must prove an unfair or deceptive act or practice. Section 5(a)(1) of the Act, 15 U.S.C. § 45(a)(1), provides that "...unfair or deceptive acts or practices in or



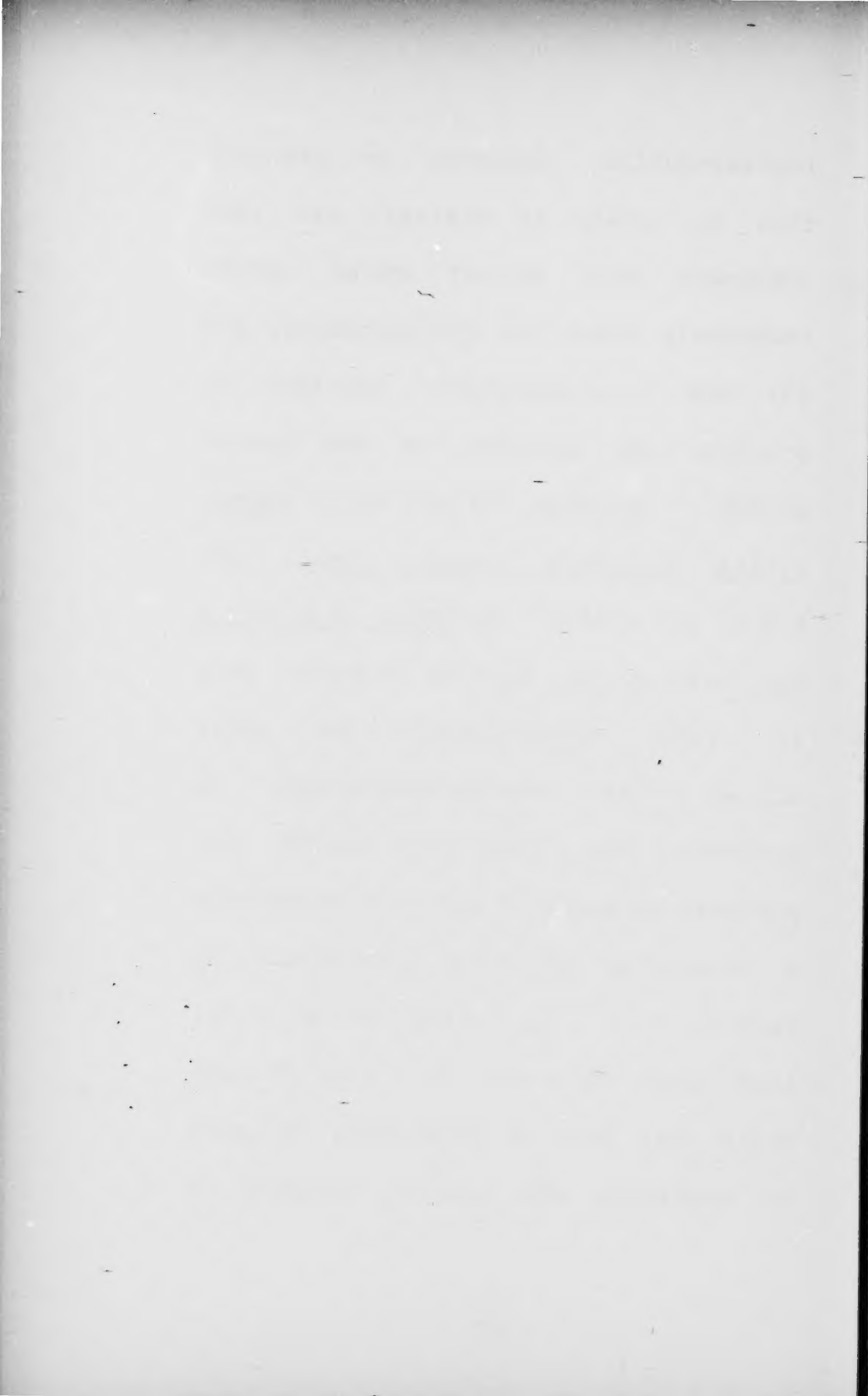
affecting commerce, are declared unlawful." Because deceptive acts have been clearly shown, the distinction between unfair and deceptive practices will not be discussed herein.³

To establish that an act or practice is deceptive, plaintiff must show (1) a

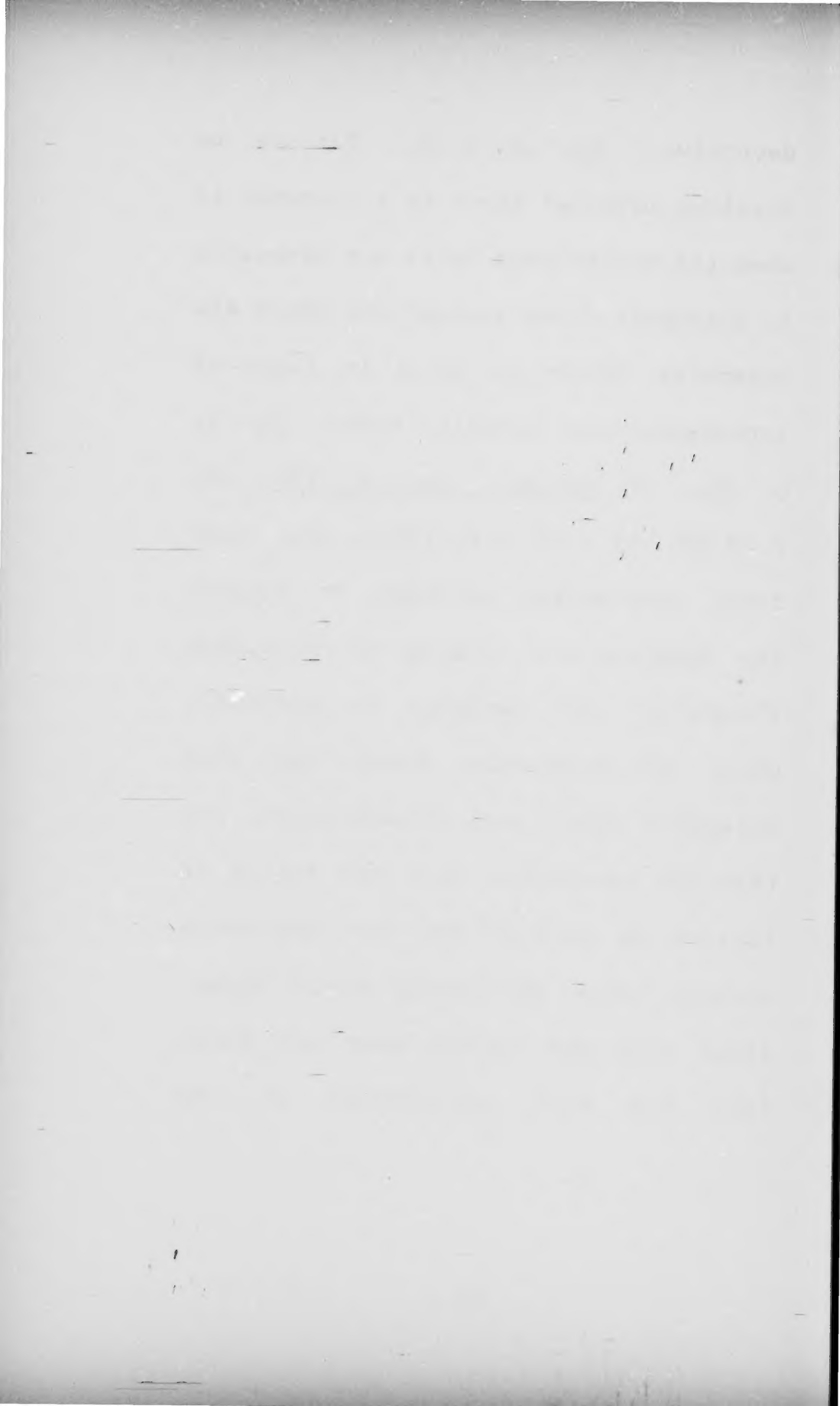
³In *American Financial Services Assoc. v. FTC*, 767 F/2d 957, 979 (D.C.) Cir. 1985), the court explained that "... the distinction between the deception rationale and the unfairness rationale tends to become obfuscated. Nonetheless the two rationales are distinct: A practice is deceptive when the consumer is forced to bear a larger risk than expected (e.g., the consumer is misled) whereas a practice is unfair when the consumer is forced to bear a larger risk than an efficient market would require." *Id.*, n.27, citing generally Craswell, "The Identification of Unfair Acts and Practices by the Federal Trade Commission," 1981 Wis.L.Rev. 107.



representation, omission or practice that is likely to mislead; (2) that consumers were misled while acting reasonably under the circumstances; and (3) the representation, omission or practice was material to the transaction. Atlantex, slip op., supra, citing Cliffdale Assoc., Inc., 103 F.T.C. 110 (1984). In FTC v. U.S. Oil & Gas, slip op, No. 83-1702 (S.D.Fla, July 10, 1987) (unpublished), the court stated that misrepresentations of material fact made to induce the purchase of goods or services constitute a deceptive practice prohibited by Section 5(a). Id., slip op. at p.34. Also, said the court, the sale of services that have no reasonable prospect of achieving the results claimed is

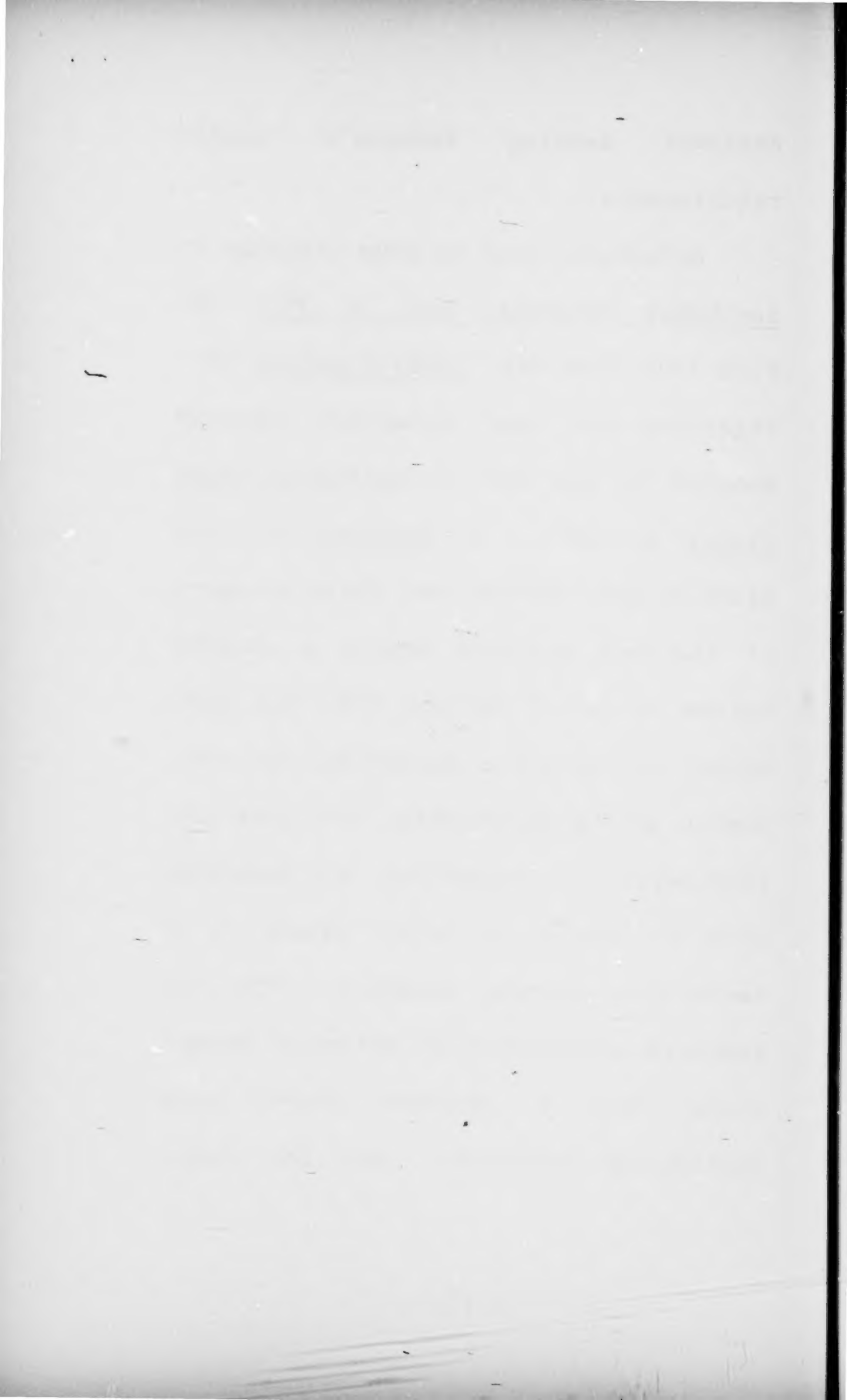


deceptive. Id., at p.35. Failure to disclose material facts to a consumer is when the undisclosed facts are necessary to dissipate false assumptions which are otherwise likely to arise in light of representations actually made. Id. at p. 36. In Speigel, Inc. v. FTC, 494 F.2d 59, 63 (7th Cir. 1974), the court found substantial evidence to support the Commission's finding of deception ("capacity and tendency to mislead") where the Commission found, not that Spiegel's offers were unconditional, but that the conditions were not stated or located in such a way that customers without undue difficulty would understand that the offers were not truly free but were conditional on the



customer meeting Spiegel's credit requirements.

Defendants rely on some language in Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986)(Sunsites II), regarding the "new" deception standard adopted by the FTC in Cliffdale Associates in 1984. In Sunsites II, the Ninth Circuit stated that three elements of the new standard impose a greater burden of proof on the FTC: (1) probable, not possible deception; (2) consumers acting reasonably, not just any consumers; (3) deceptions are material only if likely to cause injury to a reasonably relying consumer. The old standard considered as material deceptions that a consumer might have considered important. But the court



rejected defendants' contention that the new standard was substantially different from the old one. 785 F.2d at 1436. This is borne out by reading the Opinion of the Commission in Cliffdale Associates, in which the Commission states: "Consistent with its Policy Statement on Deception, issued on October 14, 1983, the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission or practice is material." The Commission added, "These elements articulate the factors actually used in most earlier Commission cases identifying whether or not an act or

practice was deceptive, even though the language used in those cases was often couched in such terms as 'a tendency and capacity to deceive.'... The requirement that an act or practice be 'likely to mislead,' for example, reflects the long established principle that the Commission need not find actual deception to hold that a violation of Section 5 has occurred. This concept was explained as early as 1964...." [Emphasis in original] Cliffdale Associates, 103 F.T.C. at 164-165.

Similarly, the requirement that an act or practice be considered from the perspective of a "consumer acting reasonably in the circumstances" is not new....[T]he law should not be applied in such a way as to find that honest representations are deceptive simply because they are misunderstood by a few....The third element is materiality [which] involves

information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.

Id. Finally, actual injury is not required. Id. at 166, n.11.

1. Defendants made representations and omissions and acted in a manner likely to mislead.

Defendants argue that their authorized script was not deceptive because the term Y-class unrestricted full economy airfare was an honest way to communicating a price cap on the offer. Placed in context, however, the argument cannot be accepted. First, the script opened with the strong implication that the price was "only \$329.90," reinforced by the false statement that the person was one of a select group of preferred credit card holders and the remark, "At

Information sent to agencies in
conformity with House Bill 10
which shall contain all the
information required.

10. That the report is not to

be made in any other

form than that of a report
to the committee on the part
of the committee on the part

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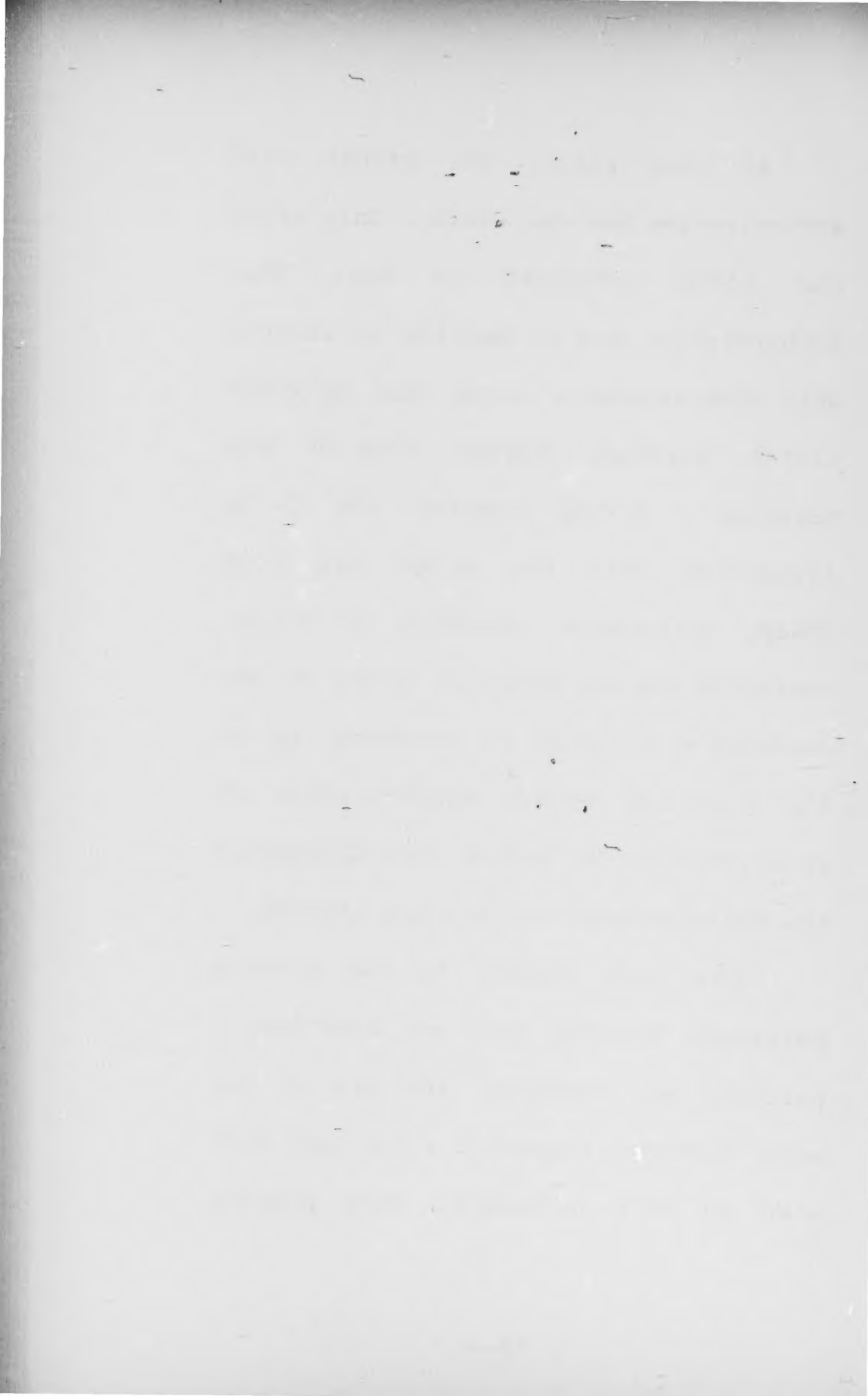
that price, I'm sure you'd like to go....." Defendants were obviously aware that the price come on would mislead because they anticipated the "probably question," "Why so cheap?" A few sentences later, before mentioning that an additional purchase was required, the script again refers to "such a low price," then stating,

For only \$329.90 you will receive your vacation voucher which entitles you to a fully paid vacation for 8 days and 7 nights for (2) people at a beautiful resort hotel, plus two roundtrip airfares, for a cost not to exceed (1) unrestricted economy airfare."

A reasonable listener over the phone would likely believe that the cost of the package was \$329.90 which was equivalent to one unrestricted economy airfare.

At that point, the credit card authorization was requested. Only after the script proposed to have that authorization did it mention in reasonably understandable terms that an additional purchase beyond \$329.90 was required. Having created the false assumption that the price was very cheap, defendants' omission of price, obviously the key material factor in any consumer's decision to purchase, or at the least an honest approximation of price, reinforced rather than dissipated the false assumption they had created.

Even with respect to the closing paragraph stating that an additional purchase was required, the use of the word "economy" suggested a low cost fare when in fact defendants were pegging



their price to a very expensive fare, the unrestricted Y-class fare. This is deceptive because the evidence reveals that the consuming public does not know the meaning of the term Y-class, making "economy" the message likely to have been communicated.

The script was also deceptive because its clear message was that the Vacation Passport was a great "deal," a bargain that couldn't be passed up, but in reality it was not a bargain at all, for comparable or less expensive vacation packages were readily available in the market at the same time. See affidavit of Mary T. George, Plaintiff's Exhibit 102; affidavit of Sharon T. Foster (Plaintiff's Exhibit 103B). As such, this was a sale that had no

shall be a very expensive one

the first thing I shall do

and the second thing I shall do

and the third thing I shall do

and the fourth thing I shall do

and the fifth thing I shall do

and the sixth thing I shall do

and the seventh thing I shall do

and the eighth thing I shall do

and the ninth thing I shall do

and the tenth thing I shall do

and the eleventh thing I shall do

and the twelfth thing I shall do

and the thirteenth thing I shall do

and the fourteenth thing I shall do

and the fifteenth thing I shall do

and the sixteenth thing I shall do

and the seventeenth thing I shall do

and the eighteenth thing I shall do

and the nineteenth thing I shall do

and the twentieth thing I shall do

reasonable prospect of achieving the results claimed and was therefore deceptive.

It can also be concluded without difficulty that defendants' actual practices, apparently caused by gross lack of disciplinary and management skills rather than a barefaced scam, adlibbing off the authorized script. The testimony of the trial witnesses in addition to the affidavits received in evidence, in which consumers had been given false promise that do not appear on an authorized script, lead to the conclusion that deviations occurred on a widespread scale. Obviously, representations that the total price was \$329.90, for example, were misleading. Likewise, representations that consumers could

look over the materials before deciding to purchase, made while actually billing the consumer, were misleading.

The other major deception was the defendants' practice of obtaining a credit card number by the caller stating that he or she wanted to verify that the customer had available credit. In light of defendants' canned response to probably objections to it, which actually stated this reason, defendants can hardly argue that they didn't do it. And even though their office policies ostensibly prohibited it, the very response the employees were required to read said the purpose was to verify credit, nothing else. Perhaps more important, although the policies required employees to make sure the

look upon the enterprise as a failure
in business and as a loss of time
the company was willing

The first year of business was not
successful, however, as the company
could not get the work done in time
and the money was lost. The second
year was also a failure, as the work
was not done in time and the money
was lost. The third year was also a
failure, as the work was not done in
time and the money was lost. The
fourth year was also a failure, as
the work was not done in time and
the money was lost. The fifth year
was also a failure, as the work was
not done in time and the money was
lost. The sixth year was also a
failure, as the work was not done in
time and the money was lost. The
seventh year was also a failure, as
the work was not done in time and
the money was lost. The eighth year
was also a failure, as the work was
not done in time and the money was
lost. The ninth year was also a
failure, as the work was not done in
time and the money was lost. The
tenth year was also a failure, as
the work was not done in time and
the money was lost.

customer understood that the number was for a purchase, nothing in the authorized script to which they were purportedly tied, said it.

Finally, the evidence is overwhelming that numerous people were billed for passports in circumstances lacking their consent, e.g., witnesses Werner, Hooper, Simonello, as well as the affidavits of Jill G. Johnstone (Plaintiff's Exhibit 101) and Walter Worley Fain (Exhibit 108). The greatly excessive charge-backs experienced at the bank are further corroboration that consumers legitimately disputed the charges made.

2. Consumers - acting reasonably were actually misled.

In U.S. Oil & Gas, the district court stated that proof of reliance by each consumer is not required and found sufficient evidence to support an order of restitution based on the following evidence: (1) evidence of widespread misrepresentations; (2) common sense judgment that the misrepresentations would be central to the decision of a reasonable consumer whether to invest; (3) un rebutted affidavit testimony by consumers corroborating the inference that the misrepresentations were highly material to the purchase decision; and (4) the absence of meaningful evidence by defendants to rebut the inference drawn from (1) - (3) that other consumers relied to their detriment. The court stated that the defendants'

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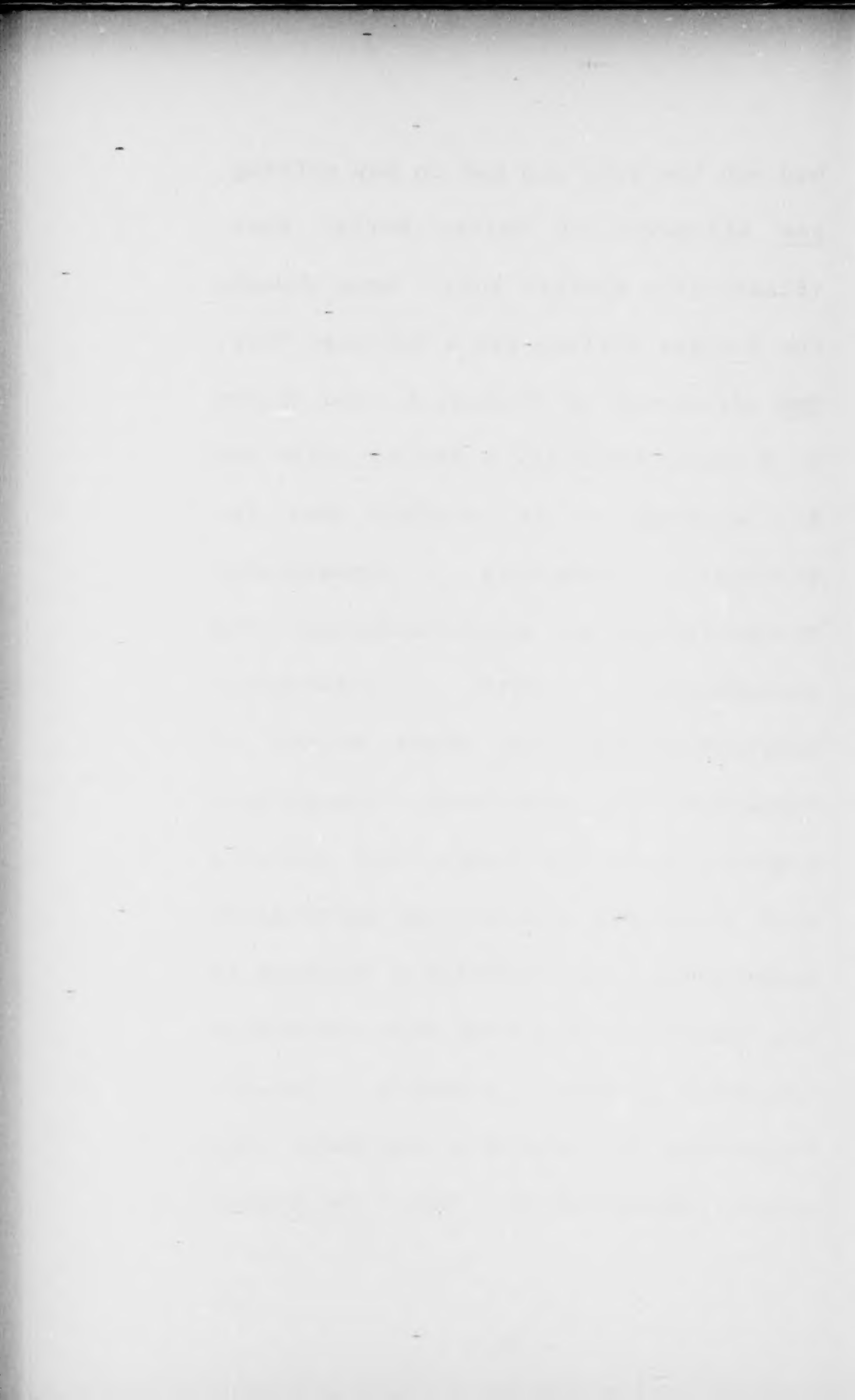
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failure to disclose material information was central to their deception and a material omission which justified an inference of reliance. Regarding the element of injury, the court held that representative proof of injury was sufficient in an FTC enforcement action, as opposed to a private action for fraud. U.S. Oil & Gas, slip op., at 48-49, citing Kitco and FTC v. International Diamond Corp., 1983-82 Trade Cas. (CCH) ¶ 65,506, 69,704 (N.D. Calif. 1983).

As the witnesses testified and as the affidavits and many complaints corroborated, many consumers were actually misled into thinking that the price of the voucher was the price of the vacation. Some thought that they



had won the trip and had to pay nothing,
see Affidavit of Walter Worley Fain,
(Plaintiff's Exhibit 108). Some thought
the Y-class airfare was a low cost fare.
See affidavits of Michael L. and Sharon
T. Foster (Plaintiff's Exhibit 103A and
B), although it is possible that in-
dividual consumers unreasonably
misunderstood or mischaracterized the
conversation with defendants'
representatives, the sheer volume of
complaints to defendants, charge-back
requests with the banks, and contacts
with state and federal law enforcement
authorities lends undeniable credence to
the Commission's claims that reasonable
consumers were actually misled.
Concerning Mr. Anolik's testimony that
since deregulation the reasonable



consumer would not be misled, little can be made of it. If in fact, as well established here, reasonable -- indeed some highly intelligent and sophisticated -- consumers were misled, one can only conclude that Mr. Anolik's high estimation of the public's discernment is not warranted. Moreover, he was asked or in a position to evaluate the deviations from the script which clearly misled many consumers.

3. The misrepresentations, omissions and practices were material to the transaction.

A misrepresentation is material if it goes to a fact that a reasonable person would regard as important in deciding on a course of action. Cliffdale, 013 F.T.C. at 165. The failure to disclose material information may cause

an advertisement to be deceptive even if it does not state false facts. Sterling Drug, Inc. v. FTC, 741 F.2d 1146, 1154 (9th Cir. 1984); Katharine Gibbs School, Inc. v. FTC, 612 F.2d 658, 665 (2d Cir. 1979). The FTC need only prove that the alleged deceptive practices were the type of misrepresentations upon which a reasonably prudent person would rely, that the misrepresentations were widely disseminated, and that the injured customers actually purchased the product. Proof of actual materiality of an omitted fact through consumer testimony is unnecessary, as an inference of materiality may reasonably be made when a deceptive omission is found. U.S. Oil & Gas, slip op. at p.36, citing FTC v. ColgatePalmolive Co., 380 U.S. 374,

391-92 (1965). The burden then shifts to the defendants to prove that the misrepresentations were not relied on by the consumers. Kitco, 612 F.Supp. at 1293, citing International Diamond, 1983-82 Trade Cases (CCH) at 69,709.

The evidence leaves no doubt that in most instances the consumers whose testimony and affidavits were received in evidence would not have made the purchase had they known the actual price because the actual price was not the type of "deal" that would motivate a person to sign on over the telephone based on so little information. Even those who might have purchased based on price were misled to believe they had time to consider price and other items before purchasing when in fact they were

billed immediately. Obviously, it is a material omission to tell someone his credit card number is wanted for verification of credit when in fact the purpose was to take \$329.90 of his money. In sum, defendants have not met their burden to prove their misrepresentations were not relied on. There is no evidence of fact that a large number of others were misled. For these reasons, the court concludes that the defendant corporations have engaged in the alleged unlawful practices in violation of section 5(a) of the Act.

- B. The Commission has established that the individual defendants have committed deceptive acts in commerce.

We turn now to the issue of whether defendants McCann and Weiland have also

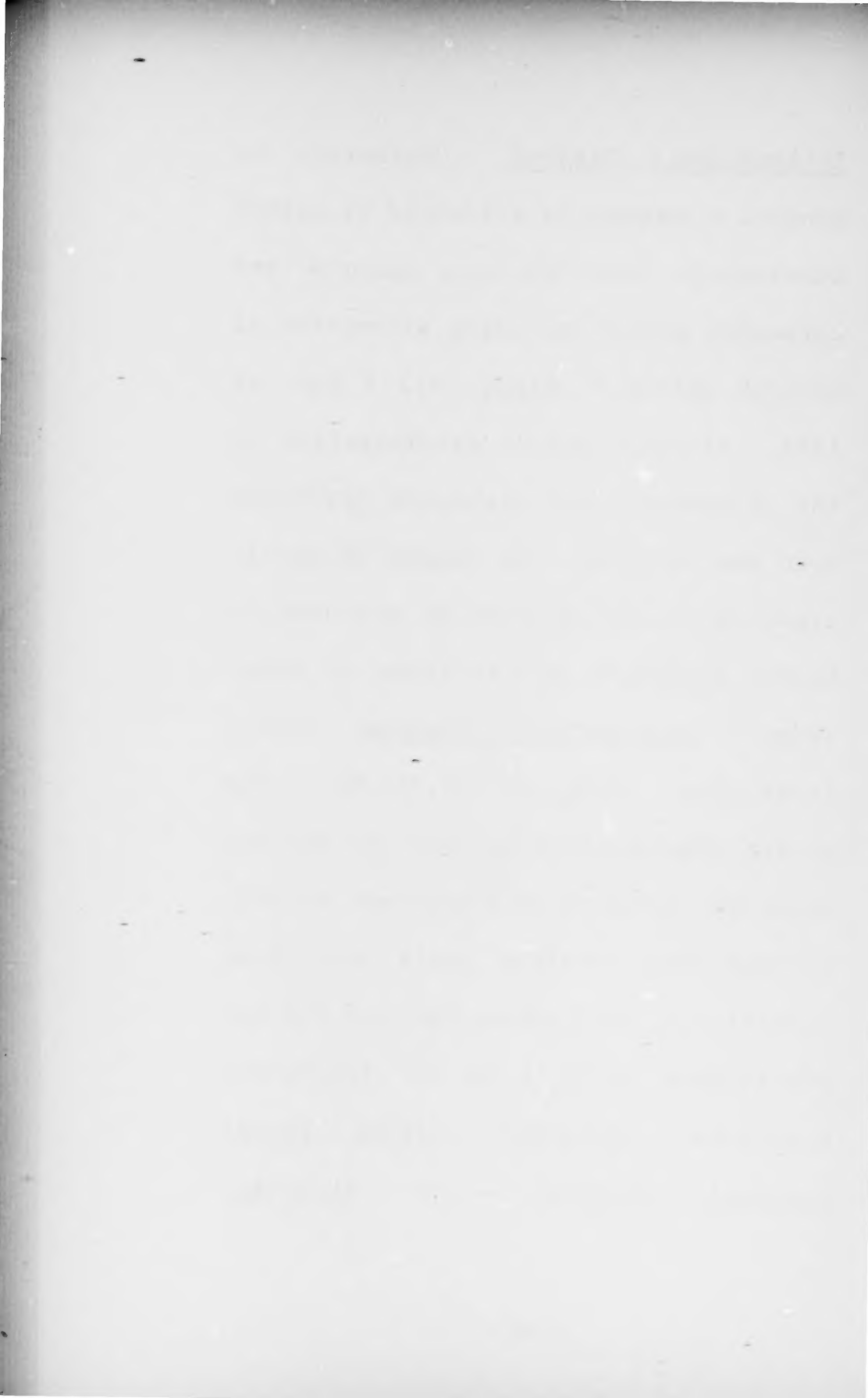
violated the Act. The law is clear on the issue of individual liability. The two key cases are Kitco, 612 F.2d at 1292 , and International Diamond, 1983-2 Trade Cas. (CCH) at 69,707709. These cases establish that an order requiring individual defendants to pay restitution to consumers for violations of law accomplished through their corporations is appropriate if the Commission shows (1) that the individuals knew that their companies or one or more of their agents engaged in dishonest or fraudulent acts or practices; (2) that the individual defendants either directly participated in the acts or practices or had the authority to control them; (3) that the misrepresentations or omissions employed in the fraudulent scheme were the type

upon which a reasonably prudent person would rely; and (4) the misrepresentations and omissions resulted in consumer injury. To meet the first element of this standard, it is enough to show either actual knowledge of the dishonest or fraudulent acts or practices, reckless indifference to the truth or falsity of the representations, or an awareness of a high probability of fraud, coupled with the intentional avoidance of the truth. Kitco, 612 F.2d at 1292; International Diamond, 1983-2 Trade Cas. (CCH) at 69,707.

Direct participation in the fraudulent practices is not a requirement for liability. Awareness plus failure to act within one's authority to control is sufficient. Atlantex, citing



- International Diamond. "Authority to control a company is evidenced by active involvement with business matters and corporate policy including assumption of officer duties." Kitco, 612 F.Sup. at 1292. Although direct participation in the fraudulent and dishonest practices need not be shown, the degree of participation in the conduct of business is highly probative on the issue of knowledge. International Diamond, 1983-2 Trade Cas. (CCH) at 69,707-08. The policy consideration is that one may not enjoy the benefits of fraudulent activity and then insulate one's self from liability by contending that one did not participate directly in the fraudulent practices. Atlantex, citing International Diamond. In Atlantex,



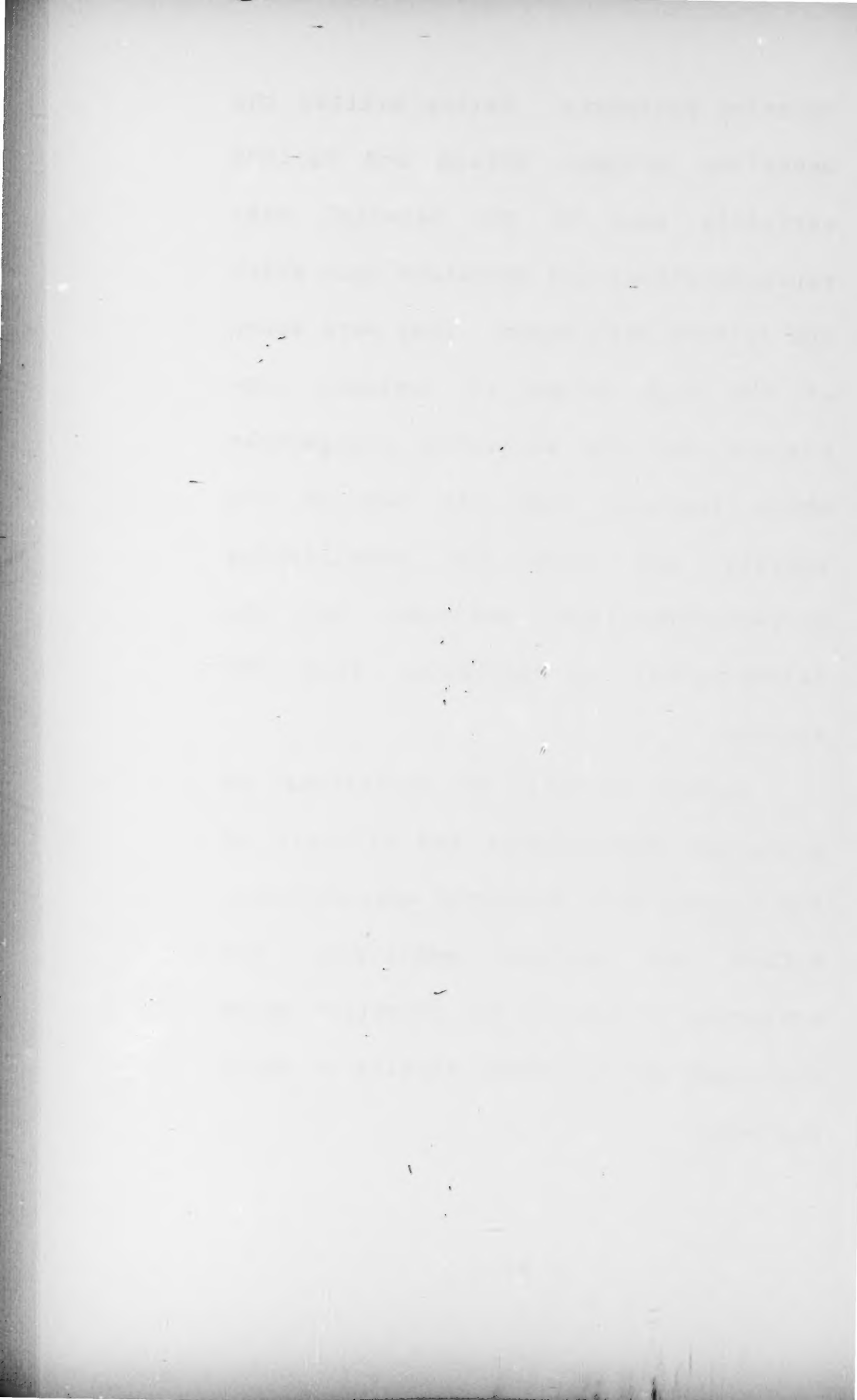
defendants were principals of the corporation and thus possessed authority to control the company's actions. One defendant was the head sales manager with authority to hire and fire and therefore had authority to control representations. The court found that the defendant corporation had passed along misleading information, and there was circumstantial evidence to establish the individual defendant's knowledge of the facts and of the corporation's activities, which he controlled. Therefore, whether defendant had actual knowledge of the misrepresentations being made in the sales floor outside his office, or whether he was merely aware of the high probability of fraud but intentionally avoided finding out

the truth, he was liable. Similarly, in WarnerLambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), the court stated that innocence of motive was not a defense if an advertisement was prejudicial to the public interest. Id. at 763, n.70.

The Commission has more than met its burden under this test. Although it appears that McCann and Weiland themselves did not make sales calls to consumers, the level of admitted participation by McCann and Weiland in the business more than adequately supports a finding that these individuals had knowledge of the practices at issue. McCann and Weiland designed and on a day-to-day basis oversaw the sales operation with the clear purpose of inducing consumer purchases of their

vacation passports. Having written the deceptive scripts, McCann and Weiland certainly knew of the material misrepresentations and omissions upon which the scripts were based. They were aware of the high volume of customer complaints and the excessive chargebacks which resulted from the use of the scripts and from the embellishing misrepresentations employed by the telemarketers in deviation from the scripts.

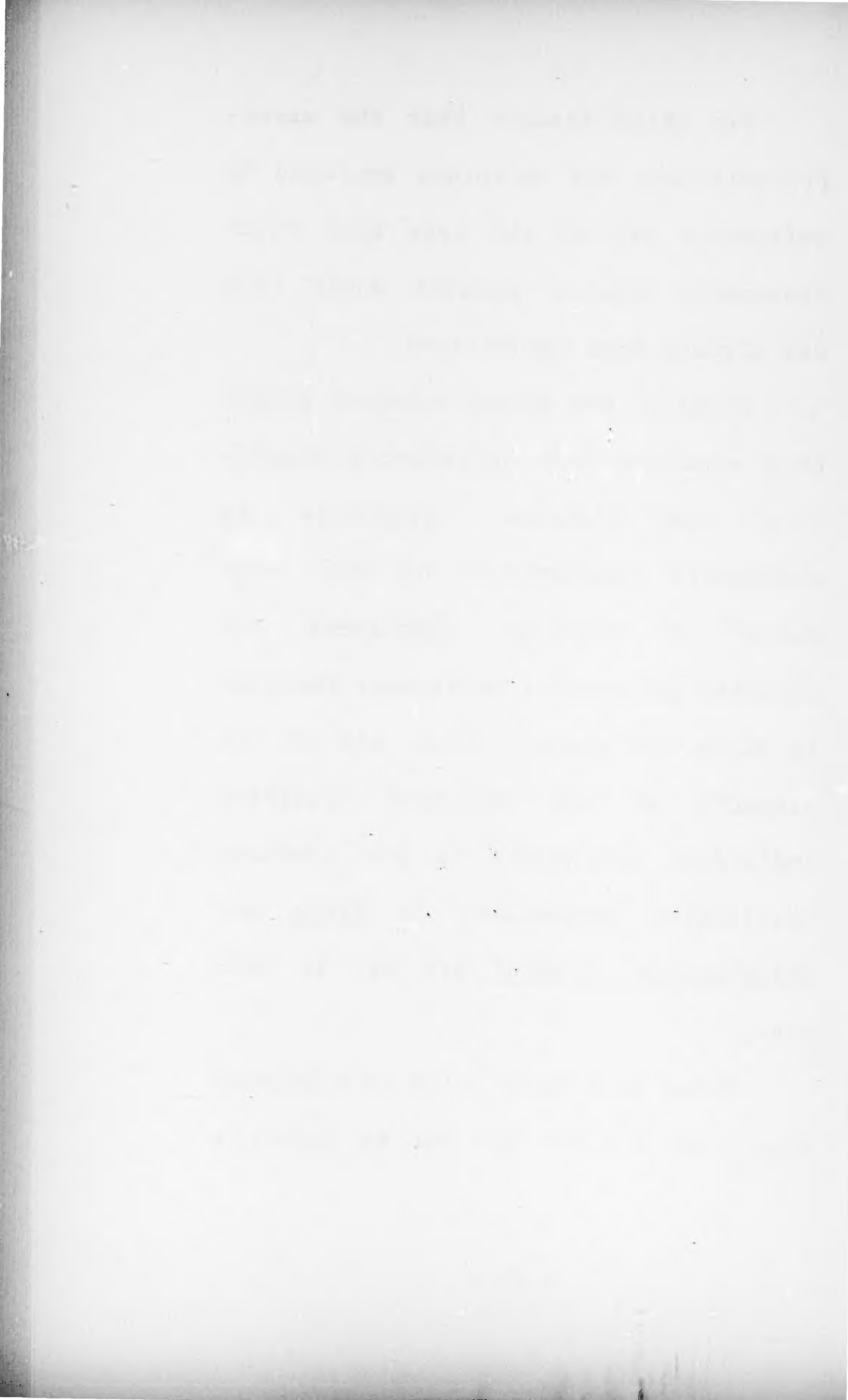
Second, by their own admissions, as principal shareholders and officers of the closely held defendant corporations, McCann and Weiland admittedly had authority to control the deceptive sales operation and all other aspects of their business.



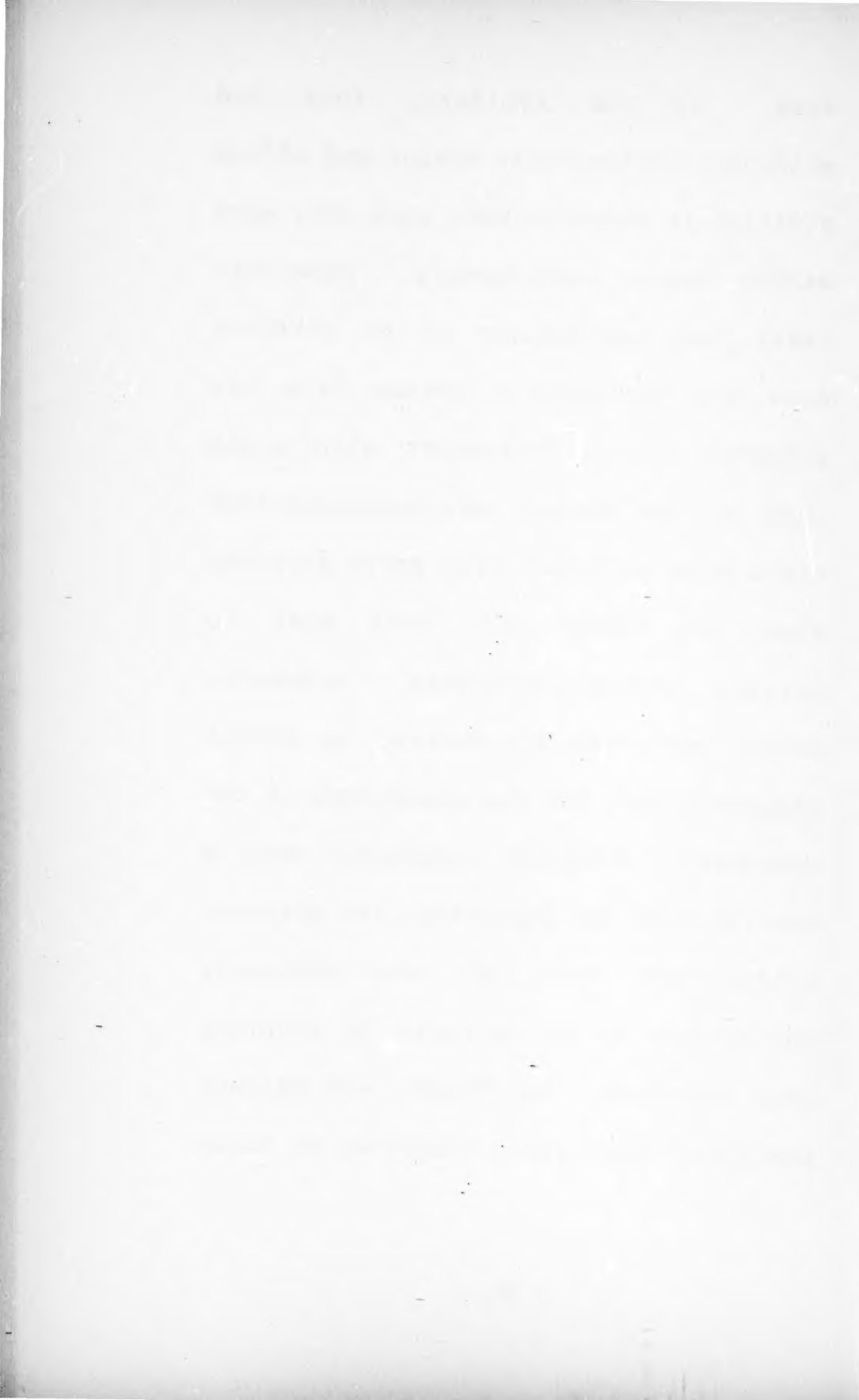
The third element that the misrepresentations and omissions employed by defendants are of the type upon which reasonably prudent persons would rely has already been established.

Finally, the actual consumer injury that resulted from defendant's fraudulent and dishonest practices is abundantly demonstrated by the large number of consumer complaints and requests for credits defendants received as discussed above. Thus, all of the elements of the standard requiring individual defendants to pay consumer restitution articulated in Kitco and International Diamond are met in this case.

These defendants offer as a defense that they did not set out to create a



scam. To the contrary, they had attorneys review their script and office policies in order to make sure they were within legal requirements. Nevertheless, the imprimature of an attorney does not exonerate a person from his unlawful acts. Defendants also claim that to the extent misrepresentations might have occurred, they never approved them but rather did their best to correct their employees' misdeeds. McCann and Weiland admitted to direct responsibility for the operations of the companies. Consumer complaints were a reality from the beginning, yet whatever action was taken it was obviously ineffective as no decrease in problems ever occurred. Yet McCann and Weiland continued their rapid expansion of sales

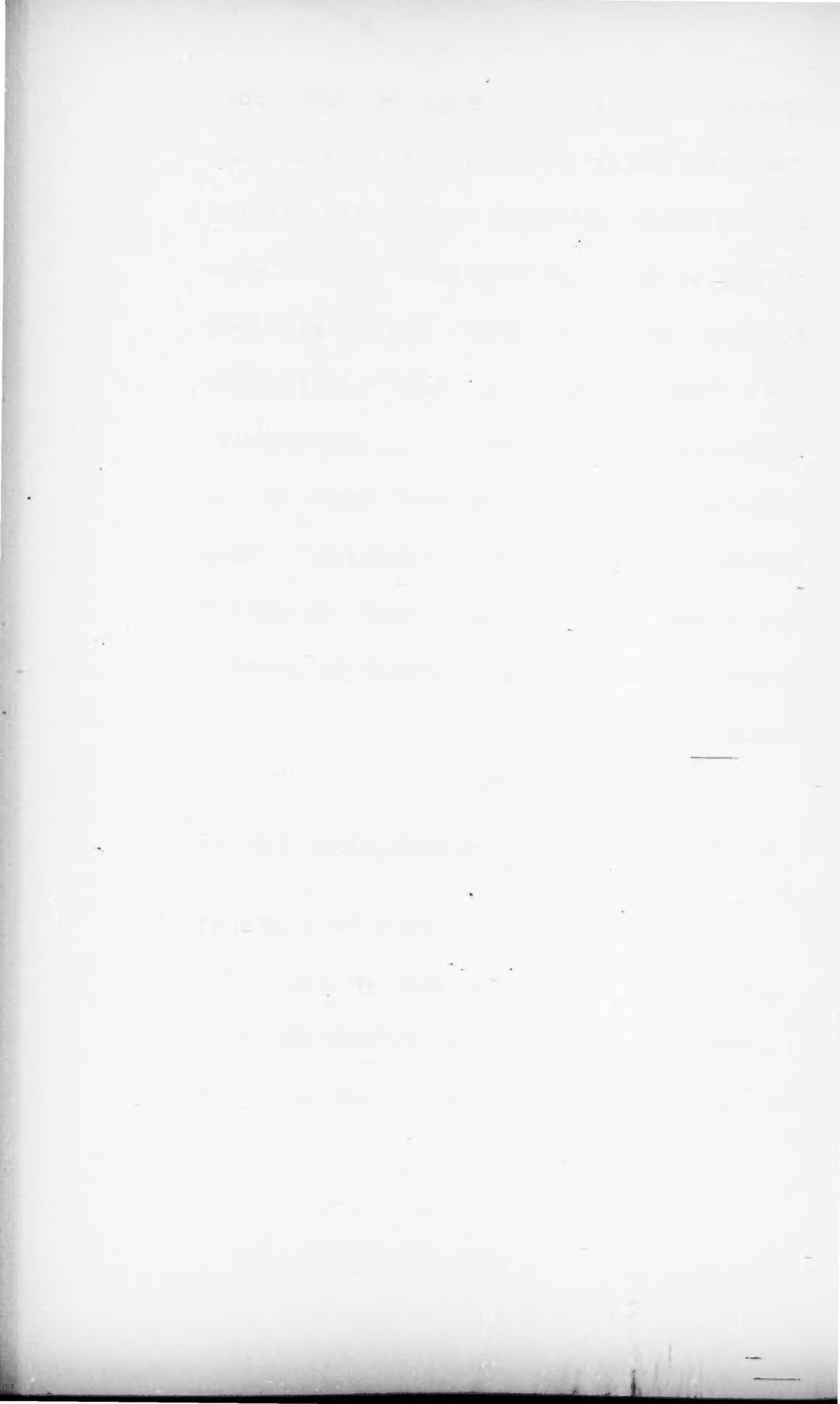


operations. It can only be concluded that the money was rolling in too fast to motivate defendants to deal effectively with these problems. Defendants further argument that their problems were caused by the law enforcement authorities is also unsustainable. Although the searches and seizures of documents undoubtedly impaired their functions, it is plain that deceptive practices occurred well prior to governmental interference.

RELIEF

- A. This is a proper case for an injunction.

As discussed above this is a proper case for an injunction and an order for injunction against all defendants will be entered with respect to all the



practices complained of, even though the corporations are currently inactive and Weiland and McCann are not engaged in this type of sales activity. The fact that illegal conduct has been discontinued does not render a controversy moot. Carter Products, Inc. v. FTC, 323 F.2d 523, 531 (5th Cir. 1963); Clinton Watch Company v. FTC, 291 F.2d 838, 841 (7th Cir. 1961). Further, no proof is required that the practices will be resumed. "Where an illegal trade practice is once proved against an enterprise, and is capable of being perpetuated or resumed, it may be presumed to have been continued, and an order may issue to prevent it, even upon a showing that it has been discontinued or abandoned." P. F. Collier & Son Corp. v. FTC, 427 F.2d



261, 275 (6th Cir. 1970). This is such a case.

- B. Rescission of contract and restitution is also an appropriate remedy for some consumers.

While it appears clear that the FTC does not have the power itself to compel restitution under its general cease and desist powers, see Heater v. FTC, 503 F.2d 321, 321-22 (9th Cir. 1974), the court does have the power to compel restitution. See FTC v. Evans Products Co., 775 F.2d 1084, 1087 n.1 (9th Cir. 1985); Baum v. Great Western Cities, Inc. & New Mexico, 703 F.2d 1197, 1208-09 (10th Cir. 1983). See also Singer supra., 668 F.2d at 1113 (rescission and restitution are within courts' ancillary equitable jurisdiction); FTC

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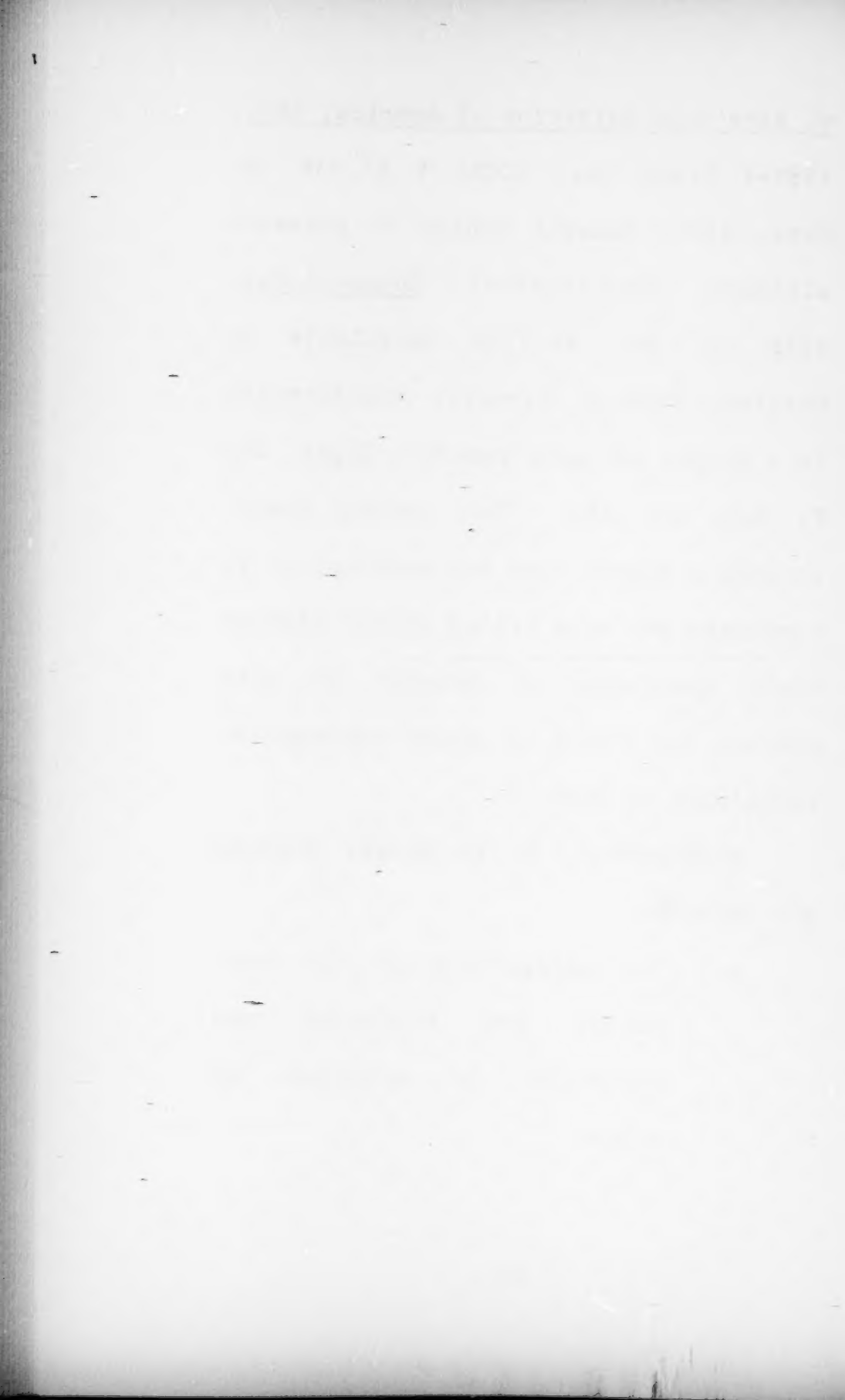
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v. Rare Coin Galleries of America, Inc.,
1986-2 Trade Cas. (CCH) ¶ 67,338 (D.
Mass. 1986) (assets frozen to preserve
ultimate restitution); Engage-A-Car,
slip op. No. 86-3758 (available on
Westlaw, FABR-CS Library) (restitution
is a proper ultimate remedy); Kitco, 612
F. Supp at 1291. This record demon-
strates a proper case for restitution to
consumers who were billed either without
their knowledge or consent or with
consent but based on false representa-
tions made to them.

ACCORDINGLY, IT IS HEREBY ORDERED
AND DECREED:

- A. The allegations of the com-
plaint are sustained and
plaintiff is entitled to
relief;



B. A final order of permanent injunction and restitution against defendants Amy Travel Service, Inc., Resort Performance, Inc., Resort Tele-marketing, Inc., Thomas P. McCann III, and James F. Weiland will be entered;

C. The Commission is directed to draft a proposed order for injunction and restitution consistent with this decision and to serve a copy of the draft on defendants by February 18, 1988. The parties are directed to resolve what differences they may have concerning the proposed order and to submit

the proposed order to the court not later than February 25, 1988. Defendants shall file any objections concerning terms which the parties have been unable to resolve by that date, also. An injunction will be entered promptly thereafter.

ENTER:

JOAN HUMPHREY LEFKOW
United States Magistrate

Date: February 10, 1987

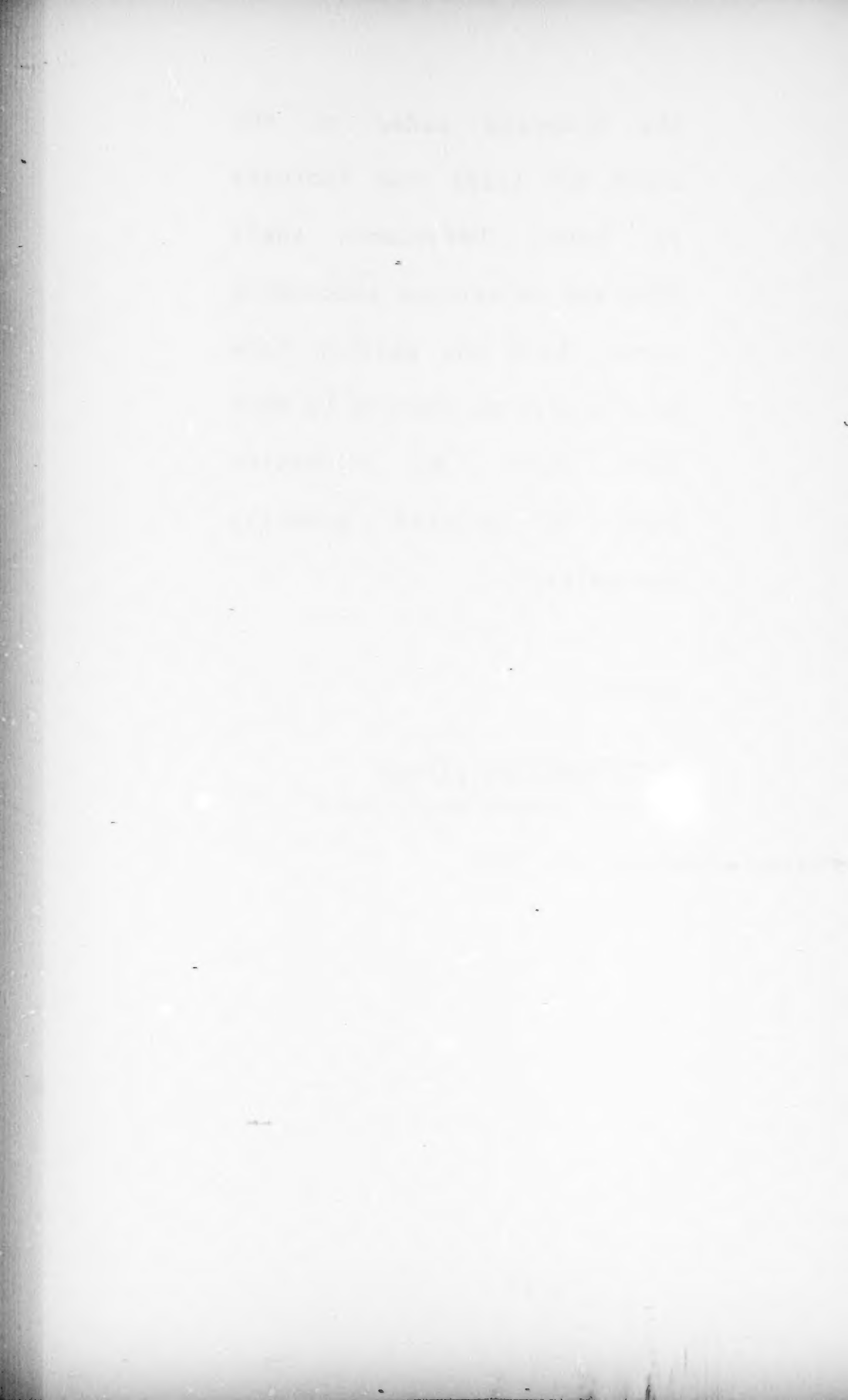


EXHIBIT 2



IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE §
COMMISSION §

Plaintiff §

vs. §

NO. 87 C 6776

AMY TRAVEL §

SERVICE, INC. §

INC., RESORT §

PERFORMANCE, INC., §

RESORT TELE- §

MARKETING INC., §

THOMAS P. MCCANN, §

III, AND §

JAMES F. WEILAND §

Defendants. §

FINAL ORDER OF PERMANENT INJUNCTION AND
RESTITUTION

This action having been tried and
Findings of Fact and Conclusions of Law
having been entered on February 10,
1988;

IT IS ORDERED AND DECREED that defendants Amy Travel Service, Inc. Resort Performance, Inc., Resort Tele-marketing, Inc., Tthomas P. McCann III, and James F. Weiland, and each of them and their officers, agent, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, directly, or through any corporation or other device, in connection with the sale or offering for sale of any "Vacation Passport" or any oral or written agreement to provide vacation or travel services, be and are hereby permanently enjoined from the following:

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
IN TWO VOLUMES
BY NATHANIEL BENTLEY
OF THE BOSTON BAR
AND
JAMES B. BENTLEY
OF THE BOSTON BAR
PUBLISHED BY
J. B. BENTLEY
1822

A. Making, or assisting in the making of, directly or by implication, orally or in writing, any representation that

1. Purchasers of such Vacation Passports or other oral or written agreements to provide vacation or travel services are entitled to fully paid vacations, including roundtrip airfare and hotel lodging, for a stated price, if, in actual fact, purchasers are required to pay additional sums in order to obtain a vacation;

2. A prospective purchaser must provide his or her credit card number for the purpose of



verifying th the purchaser's eligibility, or for any other purpose other than to bill charges to the prospective purchaser's account.

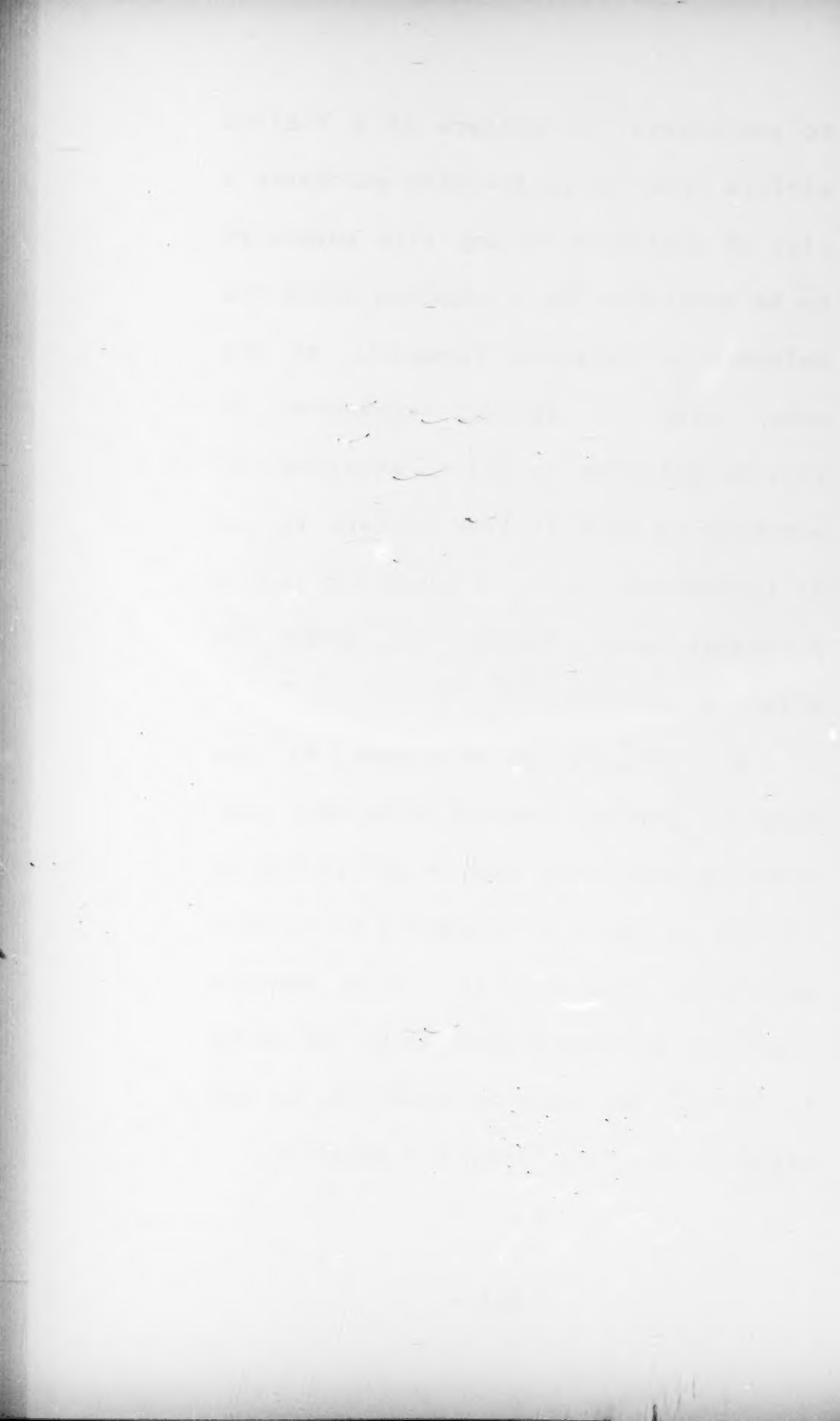
B. Billing charges for any Vacation Passport or any other oral or written agreement to provide vacation or travel services, or billing any other charge to any credit card account without the account owner's express authorization to bill the exact amount charged to the owner's account.

C. Failing to disclose, at the time of initial contact with any prospective purchaser, and in any follow-up contact by telephone or written materials, the actual cost within seven days prior to, or on the day of, the contact



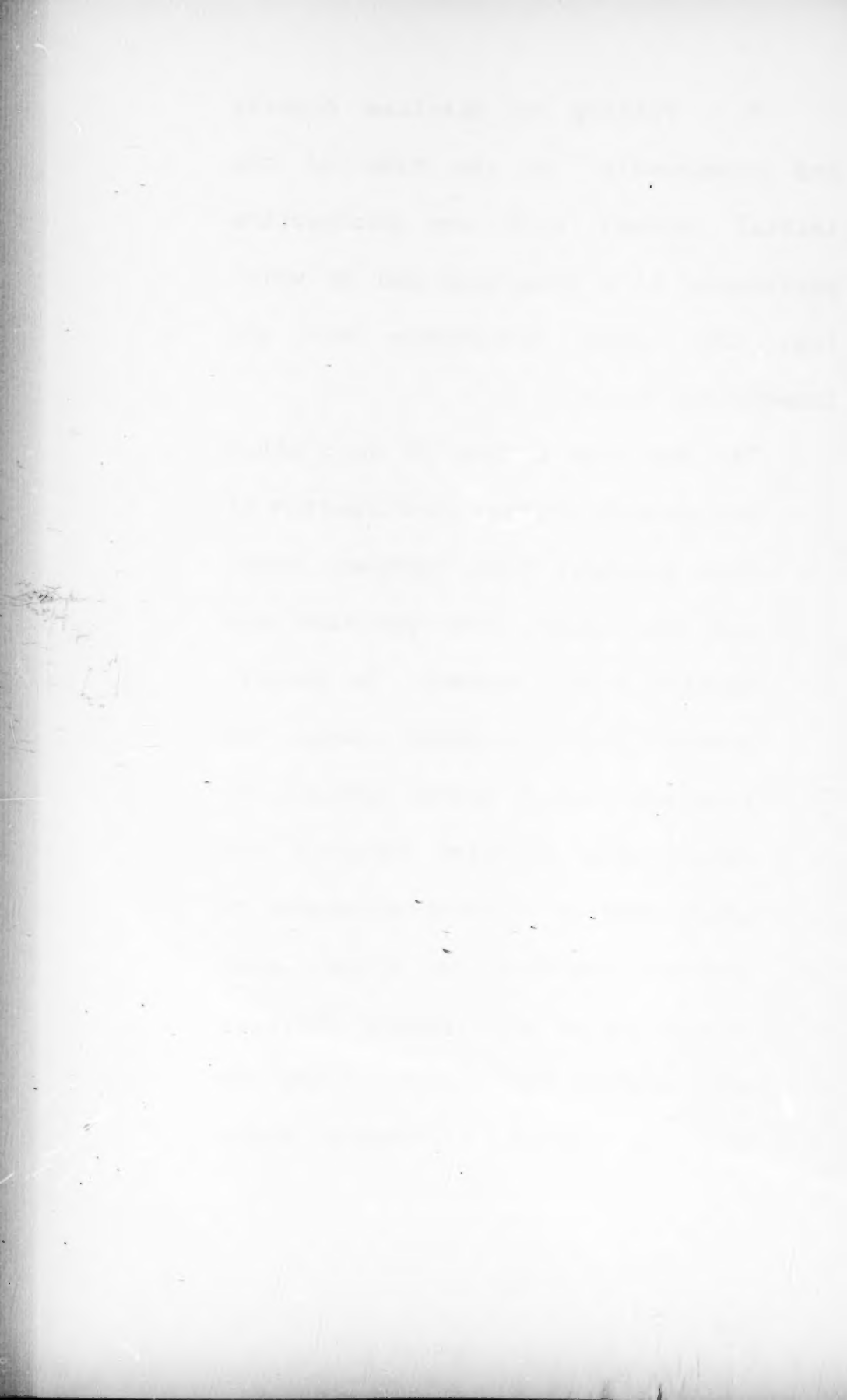
to purchasers, in dollars of a Y-class airfare from the prospective purchaser's city of residence to any site purported to be available for a vacation under the defendant's Vacation Passports or any other oral or written agreement to provide vacation or travel services, if purchase of such Y-class airfare is, or is represented to be, a condition that a purchaser must fulfill in order to obtain a vacation.

D. Failing to disclose, at the time of initial contact with any prospective purchaser, and in any follow-up contact by means of telephone or written materials, the cost in dollar amounts that the purchaser must incur in order to fulfill any term or condition of any offer in order to receive a vacation.



E. Failing to disclose clearly and prominently, at the time of the initial contact with any prospective purchasers by a telephone and in writing, the exact statements set out immediately below:

"At any time within 30 days after you receive written confirmation of your purchase from (company name) you may cancel your purchase and receive a full refund. To cancel, simply call (company name) at (company toll-free 800 number), or return your Vacation Passport (or other oral or written agreement to provide vacation or travel services) to us at (company address) with a short explanation of why you wish to cancel. (Company name)



will promptly process a full credit to your account".

F. Failing to disclose clearly and prominently in any printed or written material sent to any purchasers or prospective purchasers of any Vacation Passport or other written or oral agreement to provide vacation or travel services the exact statements set out in Paragraph E above, in type of at least 12 points in size.

G. Failing to process and transmit to the appropriate credit card issuer a full credit to the purchaser's account for the amount billed to the purchaser's account by defendants within seven (7) business days of receipt of notice from any purchaser of any Vacation Passport or other written or oral agreement to

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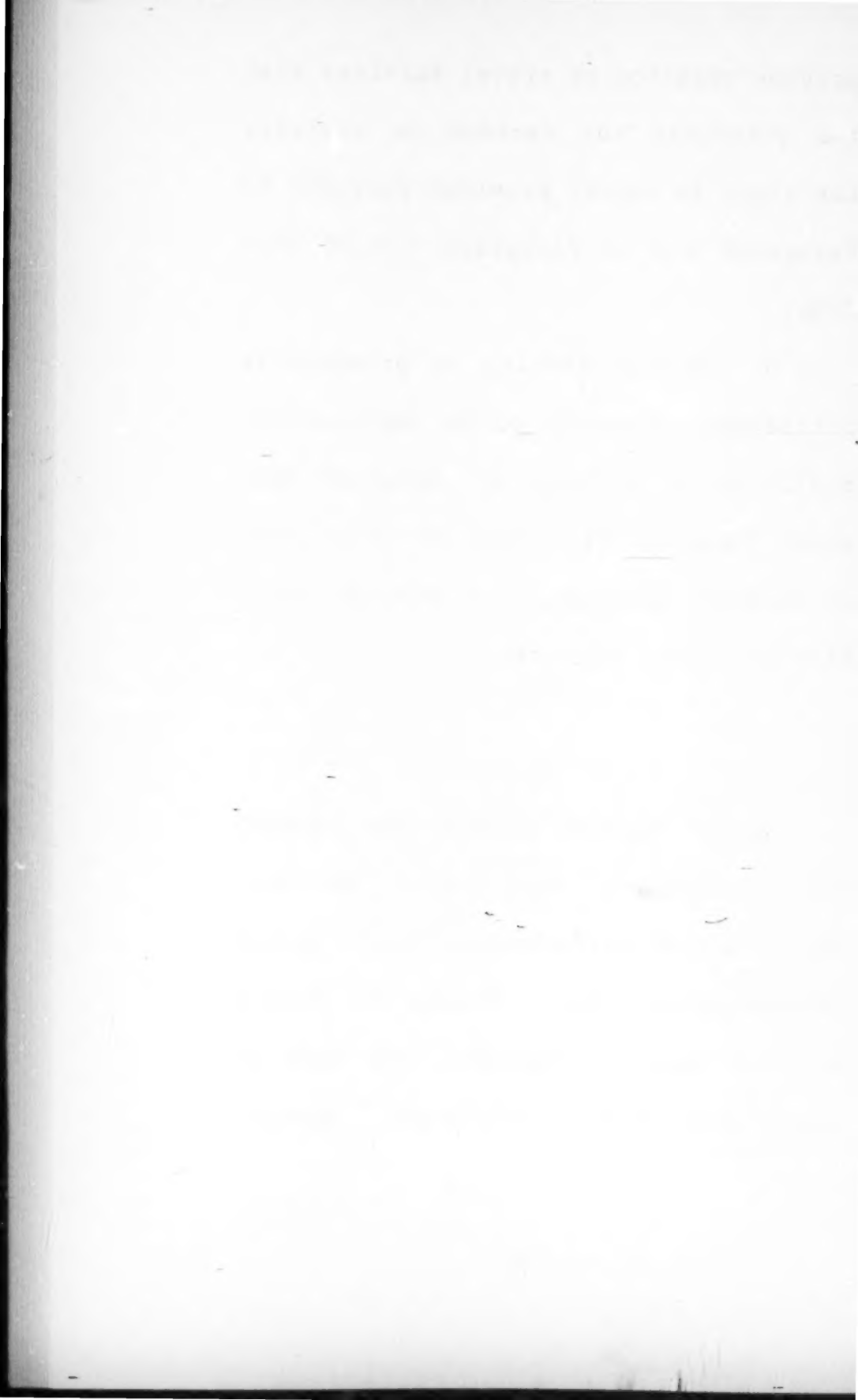
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provide vacation or travel services that the purchaser has decided to exercise the right to cancel provided pursuant to Paragraph I.E or Paragraph I.F of this Order.

H. Misrepresenting to prospective purchasers, directly or by implication, orally or in writing, any material fact about Vacation Passports or other oral or written agreements to provide vacation or travel services.

II.

IT IS FURTHER ORDERED AND DECREED that defendants Amy Travel Service, Inc., Resort Performance, Inc., Resort Telemarketing, Inc., Thomas P. McCann III and James F. Weiland, and each of them and their officers, agents,



servants, employees and attorneys, and those persons on active concert or participation with them who receiver actual notice of this Order, by personal service or otherwise, directly or through any corporation or other device, be and are hereby permanently enjoined, in the sale of any product or service, from the following:

A. Misrepresenting, directly or by implication, the price of such product or service;

B. Failing to disclose to prospective purchasers all material costs of such product or service;

C. Making a credit card charge or in any other manner billing any person for such product of service without such person's knowing authorization:

D. Failing to provide written confirmation of any sale to a purchaser within ten days of sale.

III.

IT IS FURTHER ORDERED AND DECREED that Defendants Amy Travel Service, Inc., Resort Performance, Inc., Resort Telemarketing, Inc., Thomas P. McCann III and James F. Weiland, and each of them, shall jointly and severally pay to the Federal Trade Commission the sum of \$6,629,100⁴ in redress for their

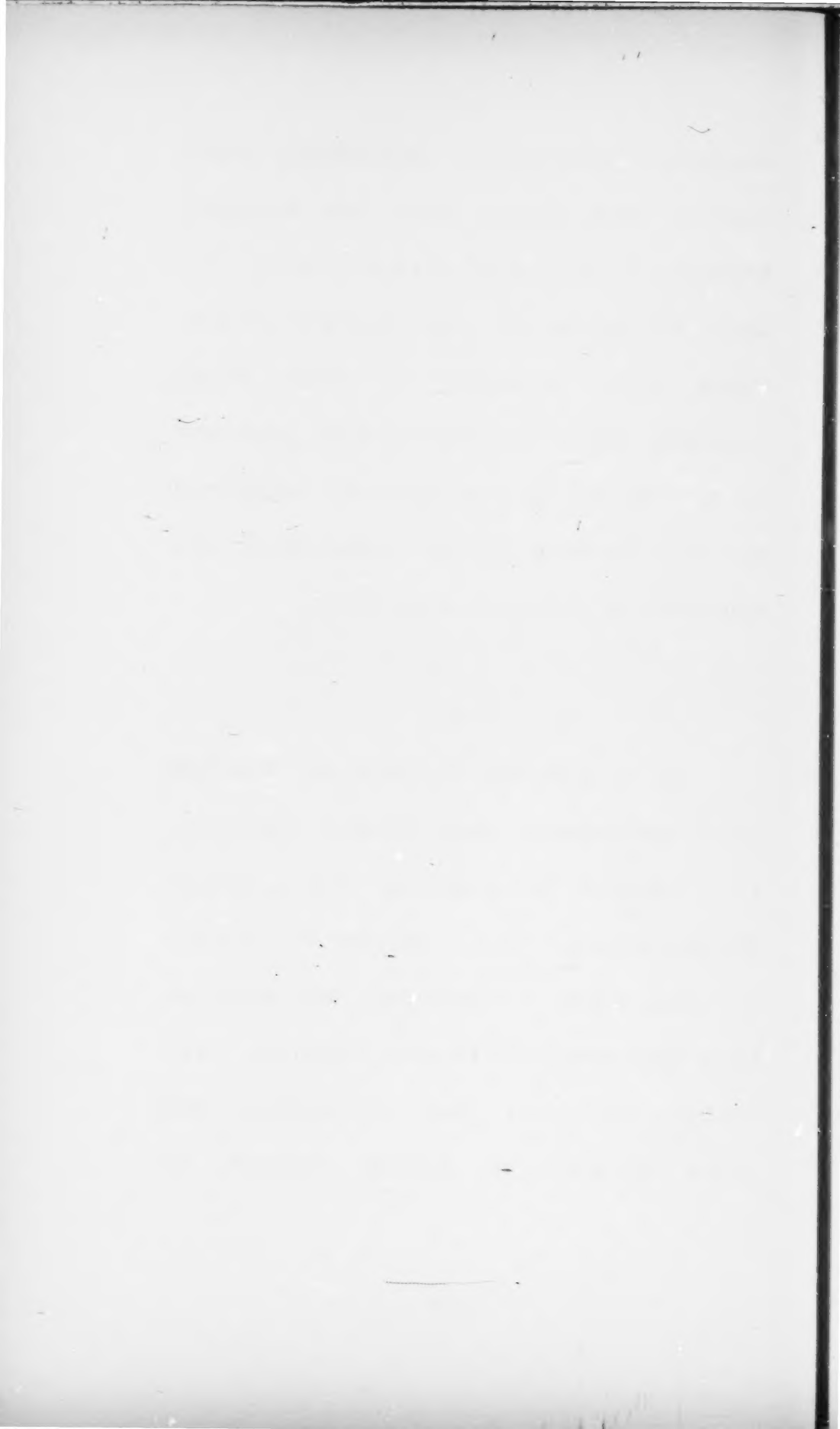
⁴ This amount has been derived as stated in open court on May 2, 1988, based on the estimated number of consumers who purchased passports and requested vacations but did not travel (17,406) plus the estimated number who requested refunds but did not receive them (4,691), multiplied by \$300.



deceptive practices. Defendants shall deposit such monies into the Registry Account of the Court within thirty (30) days of entry of the Court's Order. Funds paid pursuant to this Final Judgment shall be distributed pursuant to a plan to be subsequently submitted by the Federal Trade Commission and approved by order of this Court.

IV.

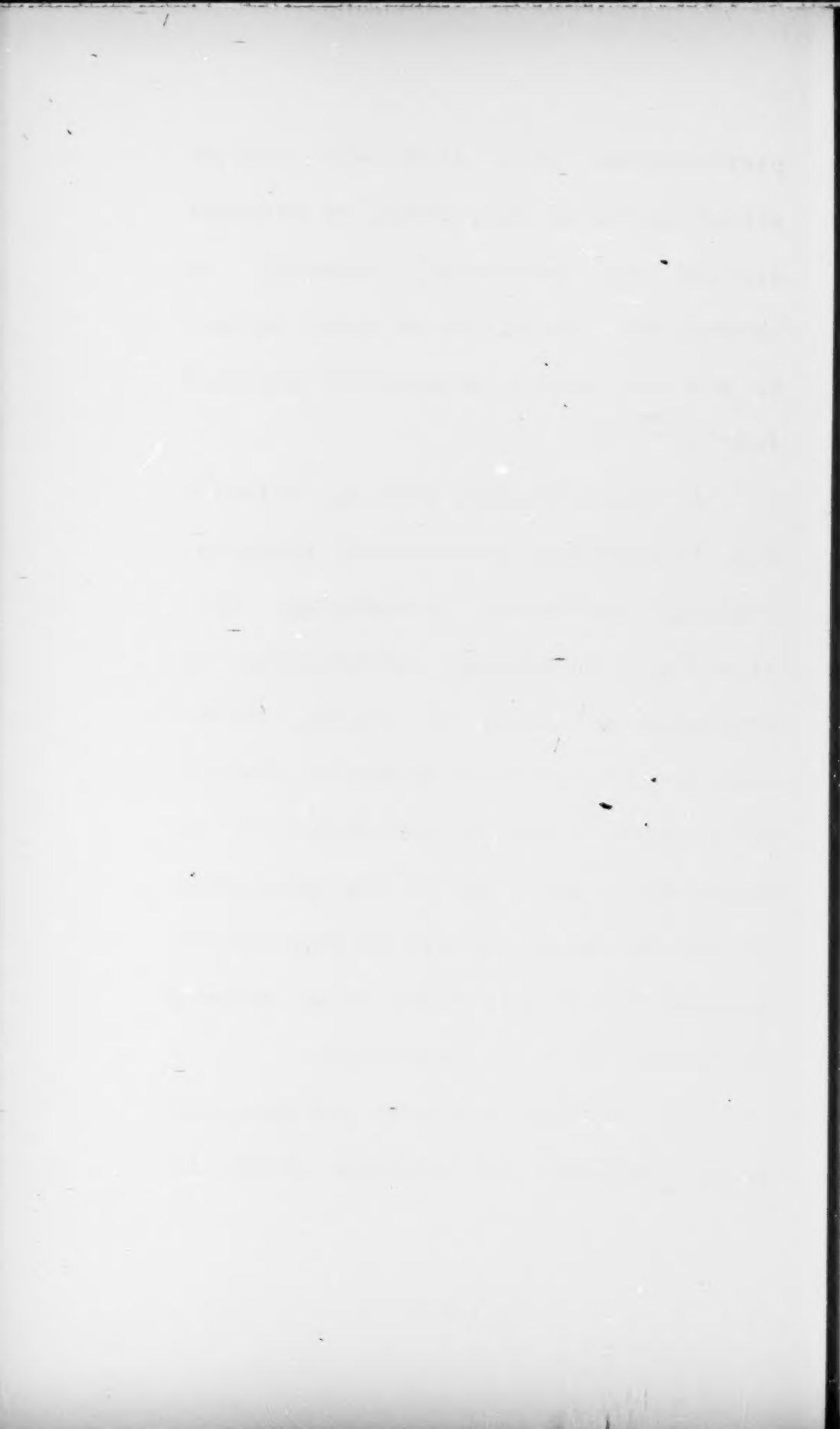
IT IS FURTHER ORDERED AND DECREED that defendants Amy Travel Service, Inc., Resort Performance, Inc., Resort Telemarketing, Inc., Thomas P. McCann III and James F. Weiland, and each of them and their officers, agents, servants, employees and attorneys, and those persons on active concert or



participation with them who receive actual notice of this Order, by personal service or otherwise, directly or through any corporation or other device, be and are hereby permanently enjoined from :

A. Transferring, selling, alienating, liquidating, encumbering, pledging, loaning, assigning, concealing, dissipating, converting, withdrawing or otherwise disposing of assets, funds, real property or other property, wherever located, owned or controlled by, in whole or in part, or in the possession of any defendant, except as required by Section III of this Order or as allowed by further Order of this Court;

B. Failing to create and maintain books, records, and accounts which, in



reasonable detail, accurately, fairly and completely reflect the incomes, disbursements transactions and use of monies by defendants; and

C. Destroying, erasing, mutilating, concealing, altering, transferring or otherwise disposing of, in any manner, directly or indirectly, any computer tapes, discs or other computerized records, books, written or printed records, correspondence, diaries, handwritten notes, telephone logs, telephone scripts, advertisements, receipt books, ledgers, personal and business cancelled checks and check registers, bank statements, appointment books, day books, copies of federal, state or local business or personal income or property tax returns, any type



of notices transmitted or to be transmitted by defendants or their agents to a credit card issuer that cause a consumer's account to be debited in the course of credit card sales by telephone, and other documents or computerized records of any kind which relate to the business practices or business or personal finances of any of the defendants.

V.

IT IS FURTHER ORDERED AND DECREED that any bank, savings and loan institution, credit union, financial institution, brokerage house, trustee, or any other person having custody or control of any accounts or other assets, owned directly or indirectly of record or



beneficially by defendants Amy Travel Service, Inc., Resort Performance, Inc. Resort Telemarketing, Inc., Thomas P. McCann III. and James F. Weiland, or any of them, shall within thirty days of service of this order sell or liquidate such account or asset and remit the proceeds of such sale liquidation to the Clerk of the Court for deposit into the Registry Account of the Court.

VI.

IT IS FURTHER ORDERED AND DECREED that for purposes of determining or securing compliance with this Order an subject to any legally recognized privilege, defendants, in connection with any business organization owned, managed or controlled in whole or in



part by a defendant and engaged in the telephonic sale of goods or services to consumers shall permit, upon reasonable written notice to defendants, for a period of five years, representatives of the Federal Trade Commission:

A. Access during normal office hours to the offices of defendants to inspect and copy all documents in the possession or under the control of defendants relating to compliance with the terms of this Order; and

B. Subject to the reasonable convenience of defendants and without restraint or interference from them, to interview, at a location reasonably convenient to both defendants and the Federal Trade Commission, the officers and employees of any such business



organization, who may have counsel present, relating to compliance with the terms of this Order.

VII.

IT IS FURTHER ORDERED AND DECREED that Thomas P. McCann III and James F. Weiland, for a period of five years from entry of this Order, promptly give written notice to the Federal Trade Commission at the following address:

Federal Trade Commission

Associate Director for

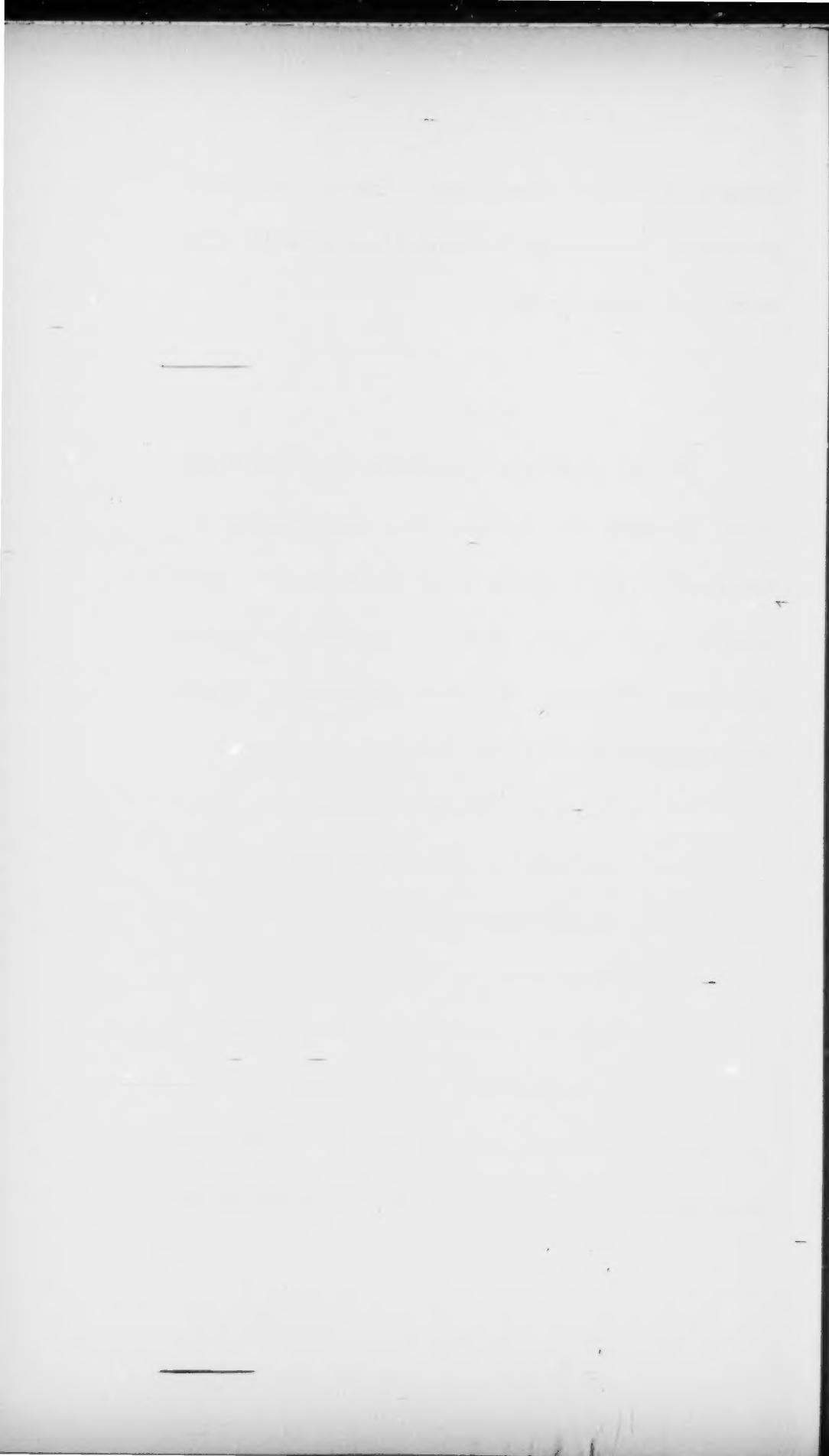
Marketing Practices

Room 238

6th St. and Penn. Ave., N.W.

Washington, D.C. 20580

of each affiliation with a different business or employment whose activities



include the sale of any product or service to the public. Such notice shall include the new business's name and address, a statement of the nature of the business, and a statement of his duties and responsibilities on connection with the business.

VIII.

IT IS FURTHER ORDERED AND DECREED that the expiration of any requirement imposed by this Order shall not effect any other obligation arising under this Order.

IX.

IT IS FURTHER ORDERED AND DECREED that Thomas P. McCann III and James F. Weiland shall, within sixty (60) days



after service upon them of this Order, file with the Commission and the Court a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

X. -

IT IS FURTHER ORDERED AND DECREED that the Court shall retain jurisdiction of this matter for all purposes.

SO ORDERED, this fourth day of May, 1988.

ENTER:

JOAN HUMPHREY LEFKOW

United States Magistrate



EXHIBIT 3



In the
United States Court of Appeals
For the Seventh Circuit

No. 88-1997

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

AMY TRAVEL SERVICE, INC.,
RESORT PERFORMANCE, INC.,
RESORT TELEMARKETING, INC.,
THOMAS P. McCANN, II, and
JAMES F. WEILAND,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87-C-5776—Joan H. Lefkow, Magistrate.

ARGUED NOVEMBER 9, 1988—DECIDED APRIL 19, 1989

Before CUMMINGS, WOOD, JR., and CUDAHY, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* The defendants in this case are three corporations and two individuals. The corporations are Amy Travel Service, Inc. ("Amy"), Resort Telemarketing, Inc. ("RTI"), and Resort Performance, Inc. ("RPI"). The individuals, Thomas P. McCann II ("McCann") and James F. Weiland ("Weiland"), were the owners and directors of the defendant corporations. These

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companies market discount vacations through the sale of "vacation certificates" or "vacation passports." The Federal Trade Commission ("FTC") filed suit to enjoin defendants' allegedly deceptive trade practices. The FTC also asked for rescission of contracts and restitution to consumers. The case was tried by consent to a magistrate, who found for the FTC. The magistrate entered a permanent injunction, ordered restitution, and imposed personal liability on the individual defendants. Defendants filed this appeal, questioning the power of the court to order such remedies and alleging other errors below.

1. FACTUAL BACKGROUND

This is an appeal from a final judgment and this court has jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345 and 15 U.S.C. § 53(b). We will detail the findings of fact made by the district court to present the necessary backdrop for this appeal.

A. "This is not a sales call, so please relax . . ."

The defendant corporations and defendants Weiland and McCann were in the business of selling travel certificates (also known as "vacation passports" or "vacation vouchers"). In 1985, Weiland and McCann incorporated RPI as an Illinois corporation to market travel certificates. In 1986, McCann, Weiland, and two others opened a "tele-marketing" sales room in Indianapolis, Indiana to sell "vacation passports" over the telephone. This business operated under the name of RTI, an Indiana corporation. As their business increased, McCann and Weiland opened eight other phone sales rooms in Texas, Illinois, Colorado, and Kentucky.¹ All of the businesses were wholly-owned

¹ The Texas operations were incorporated as Resort Telemarketing of Texas, Inc. ("RTI Texas") and Texas Communications 7 Travel, Inc. ("TCT"). The Illinois phone rooms were incorporated

(Footnote continued on following page)



subsidiaries of RTI. McCann and Weiland managed all the businesses and they were all operated as a single entity. Defendant Amy was purchased in 1985 to fulfill vacation certificate travel obligations.

The defendants used telemarketing to sell vacation packages. The service provided was similar to that performed by a conventional travel agent—the assembly of a vacation package that included air transportation and lodging at a resort area—but the method used to sell the packages was quite different than the norm in the travel industry. Defendants assembled written materials that they called a “vacation passport” and sold the passports to consumers for \$289 to \$329. The passport consisted of two pages of written material and it contained written descriptions of the vacation package being offered. The passport listed nine resort destinations and identified RPI and Amy as the presenters of the offer. The passport stated:

This Passport entitles the adult holder(s) to receive *two round-trip air tickets plus lodging* for 8 days and 7 nights for the price not to exceed one unrestricted round-trip, standard, all-year, full-economy (Y-class) airfare. Single adult travelers are entitled to the identical benefits for 50 per cent of the unrestricted Y-class fare.

The passport also detailed reservation procedures, including a requirement that all travel arrangements be made through Amy. On the back side of the passport, under the caption “Amy Travel Service Inc.,” there was a form allowing the purchaser of the passport to select three alternate destinations and departure dates. Finally, the passport included a statement that Amy “guaran-

¹ *continued*

as American Consumers Marketing, Inc. (“ACMI”) and National Consumers Marketing, Inc. The Colorado rooms were incorporated as Resort Telemarketing of Colorado, Inc., National Travel Brokers, and Travel Excellence, Inc. The Kentucky room operated as Consumers Power, Inc.



tees the lowest price of your itinerary or will pay you triple the difference in cash."

To facilitate sales of the passports over the phone, McCann and Weiland developed a "script" to be used by the telephone salespeople. The basic script² includes language

² Plaintiff's Exhibit 7 is an example of the scripts developed by the defendants. Defendants admit that this is one of their scripts.

TEXAS COMMUNICATIONS & TRAVEL, INC.

HI, MY NAME IS _____ WITH T.C.&T. OF HOUSTON, TEXAS. HOW ARE YOU TODAY? GREAT!!!! MR./MRS./MS. _____, THE REASON I AM CALLING, IS YOU HAVE BEEN *COMPUTER SELECTED* TO BE OFFERED A *SPECIAL, VACATION VOUCHER TO HAWAII FOR ONLY \$329.90!* THIS IS BEING OFFERED TO *LESS THAN 1% OF ALL THE CREDIT CARD HOLDERS IN THE U.S.*

AT THAT PRICE, I'M SURE YOU'D LIKE TO GO, HOWEVER, I DO HAVE TO ASK SOME QUALIFYING ?S FIRST. PROBABLE QUESTIONS: (1) WHY SO CHEAP? (2) WHAT'S THE CATCH? (3) WHAT DO I DO TO QUALIFY?

(REGARDLESS OF QUESTIONS, THE ANSWER IS:)

FIRST, MR./MRS./MS. _____, LET'S SEE IF YOU QUALIFY.

1. YOU ARE 21 OR OVER, AREN'T YOU?
2. YOU ARE STILL A MASTERCARD OR VISA CARD HOLDER, AREN'T YOU?
3. YOU DO PLAN TO TAKE A VACATION WITHIN THE NEXT *12 MONTHS*, DON'T YOU?
4. WHEN YOU TAKE YOUR VACATION, IF THE ACCOMMODATIONS WERE COMPLETELY PAID FOR, WOULD YOU TAKE SOMEONE WITH YOU?
5. AFTER YOU HAVE ENJOYED YOUR VACATION, WOULD YOU SEND US THE NAMES OF 3 FRIENDS WHO WOULD LIKE TO TAKE A *SIMILAR VACATION*, IF THEY WERE UNDER NO OBLIGATION?

I'M GLAD YOU SAID (YES) TO THOSE QUALIFICATIONS. . . .NOW I CAN TELL YOU WHAT WE CAN DO FOR YOU, AND WHY WE CAN OFFER YOU THIS WONDERFUL VACATION PACKAGE AT SUCH A LOW PRICE!

(Footnote continued on following page)



intimating that the offer was being made to only a few special customers. The customer must "qualify" for the offer by answering yes to a few simple questions. While the price of the voucher varied from \$289 to \$329, the price of the airfare that the prospective traveler also needed to purchase was never given. Customers were only told that the cost of the voucher entitled them to a fully paid vacation for eight days and seven nights plus two round trip

² *continued*

WE HAVE TESTED THE FEASIBILITY OF TELEPHONE MARKETING, AND THE RESULTS HAVE BEEN SO GREAT THAT WE HAVE BEEN ALLOWED TO CONTINUE TO OFFER THIS SPECIAL VACATION PACKAGE TO PREFERRED PEOPLE LIKE YOU.

MR./MRS./MS. _____, FOR ONLY \$329.90, YOU WILL RECEIVE YOUR VACATION VOUCHER, WHICH ENTITLES YOU TO A FULLY PAID VACATION FOR 8 DAYS AND 7 NIGHTS FOR (2) PEOPLE AT A BEAUTIFUL RESORT HOTEL, PLUS 2 ROUND TRIP AIRFARES, FOR A COST NOT TO EXCEED (1) UNRESTRICTED ECONOMY AIRFARE.

BY USING YOUR MASTERCARD OR VISA, YOU WILL RECEIVE YOUR VACATION VOUCHER WITHIN 7 TO 10 DAYS, OR SOONER.

AS A PREFERRED CUSTOMER. . . WOULD YOU RATHER USE MASTERCARD OR VISA . . .

(SHUT UP!!!!!!!!!!!!!!)

(WHEN YOU HAVE INTEREST, READ THIS RECAP) WHAT YOU ARE PURCHASING TODAY WITH YOUR CREDIT CARD IS A VACATION PASSPORT FOR \$329.90. THIS PASSPORT ENTITLES YOU TO 2 ROUND TRIP AIR TICKETS, PLUS LODGING FOR 8 DAYS AND 7 NIGHTS FOR 2 PEOPLE AT A RESORT HOTEL, FOR A COST NOT TO EXCEED 1 UNRESTRICTED ROUND TRIP, (Y-CLASS) FULL ECONOMY AIRFARE.

CLOSING: WHAT IS THE EXPIRATION DATE? HOW DOES THAT # READ? OK, WHILE I'M GETTING YOUR AUTHORIZATION #, I WOULD LIKE TO HAVE MY MANAGER VERIFY EVERYTHING I HAVE SAID TO YOU.

9714 OLD KATY ROAD, SUITE 212, HOUSTON, TEXAS 77055

12/8/86



airfares for a cost not to exceed one "unrestricted round trip (Y-class) full economy airfare." Customers were asked to provide their Mastercard or Visa numbers. After the script was read, the salesperson gave the phone to a supervisor who then read a document known as the "Purchaser's Acknowledgement Agreement" over the phone to the customer. This "agreement" purported to explain the details of the purchase and included a statement that

with your credit card purchase . . . for the vacation passport voucher, you are entitled to receive a fully-paid vacation for two at a cost not to exceed that of one round-trip standard, all-year, full economy ("Y" class) airfare, which you agree to purchase from the travel agency named in the voucher.³

³ The wording of the Purchaser's Acknowledgment Agreement varied, but Plaintiff's Exhibit 7-2 provides an example:

PURCHASER'S ACKNOWLEDGEMENT AGREEMENT

1. With your credit card purchase of \$329.90 for the vacation passport voucher, you are entitled to receive a fully-paid vacation for two at a cost not to exceed that of one round-trip standard, all-year, full economy ("Y" class) airfare, which you agree to purchase from the travel agency named in the voucher. In other words, for the cost of one airfare, the travel agency will provide both airline tickets and 8 days and 7 nights for two people, plus they do all the work. You have eight locations to choose from. They are . . . ACAPULCO, JAMAICA, FLORIDA, BAHAMAS, HAWAII, LAS VEGAS, COLORADO, or LONDON.
2. The travel agency's guarantee to you is: They guarantee you the lowest cost of your vacation itinerary, including both airfares and lodging for two people or they will pay you triple the difference in cash if you can find the same lodging as we offer and the same airfares for a lesser amount.
3. Your vacation passport is non-cancellable nor redeemable for cash. However, it may be transferred to another adult of your choice at no penalty. They must understand, however, that in order to take advantage of the program they must pay the equivalent, not to exceed, one round trip, standard, all year, full economy (Y-class) airfare.

(Footnote continued on following page)

A copy of this agreement was sent to the customer along with the vacation voucher.

The magistrate found that the procedure we have described was not always followed to the letter. The magistrate examined other exhibits provided by the FTC that showed how the defendants and their sales staff had departed from the standard script. Plaintiff's Exhibit 2, for example, begins:

Hi! My name is _____, I'm calling you with T.C.&T., I'm calling from Texas. This is *not* a sales call so please relax. The reason I am calling Mr./Mrs./Ms. _____, is this, you have been computer selected thru a major credit card company to be offered a *fully paid vacation to Hawaii*, for only \$289.90. . . . We are testing the feasibility of telephone marketing for an INTERNATIONAL TRAVEL AGENCY. While we are doing this pilot program, they have given us a *VERY LIMITED AMOUNT OF* these *SPECIAL* priced vacations to offer.

Defendants conceded that there was no limit on the number of vouchers available. The magistrate noted that while

³ *continued*

4. Your vacation passport will be processed and mailed to you within the next few days. The travel agency will need to receive your completed travel request form at least 45 days in advance of your requested departure date. The voucher is good through _____ 19____.
5. Your point of departure will be from any major airport serving all major cities in the continental United States.
6. You have agreed to furnish Texas Communication & Travel, Inc. with the names of three referrals either before or after you have taken your vacation. Your referrals are under no obligation to purchase.
7. Do you fully understand everything I have just read to you????

DATE:_____ REP:_____
MANAGER:_____

The first of these is the fact that the
the second is the fact that the
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McCann claimed he ordered the "this is not a sales call" line dropped, McCann had said in a deposition that he saw nothing wrong with the line. Salespersons were given canned responses to recurring customer questions. For example, salespersons were directed to respond to customer reluctance about giving out credit card numbers over the phone by stating that "... we contact MC/VISA to varify [sic] your credit. . . . If we misused any credit card number, not only would we lose that merchant number but no doubt, our bank would freeze our account for a complete audit of all business on MC/VISA." Some scripts also failed to make clear that the customer, by giving the salesperson a credit card number, would be charged for the voucher.

B. "At that price, I'm sure you'd like to go"

The defendants were quite successful at marketing their vacation vouchers. Defendants claim that approximately 35,000 certificates were sold wholesale to other companies and 25,000 were sold directly to consumers. Twelve thousand to 13,000 trips were taken by 25,000 people and some 17,000 customers were waiting for trips when the operation was shut down by the FTC. Gross revenues were around \$1.5 million in 1986 and \$4.5 million in 1987.

Consumer complaints about the defendants resulted from a number of the defendants' practices. Many consumers complained that the defendants misused their credit card numbers. A number of witnesses testified that when contacted by the salesperson, they were not told that they would be charged for a purchase—the witnesses claim the salesperson asked for a credit card number for the sole purpose of verifying the customer's credit worthiness.

Defendants ran into other troubles with banks handling defendants' credit card transactions. The difficulties arose because of the high number of consumers who disputed the charges made to their accounts by the defendants. These disputes resulted in chargebacks to the defendants' accounts when consumers refused to pay. The magistrate took note of one bank that eventually suffered over \$700,000

in consumer chargebacks. A number of banks terminated defendants' accounts due to consumer complaints.

The main consumer complaint about the defendants' pitch was a misunderstanding about the true cost of the vacation package. The vacation passport itself was sold for \$289 to \$329. Printed on the passport was an explanation of the passport's worth—the bearer was entitled to two round trip airplane tickets and lodging for eight days and seven nights for a price "not to exceed one unrestricted round-trip, standard, all-year, full-economy (Y-class) airfare." Defendants could therefore charge consumers any amount up to the cost of a Y-class airfare in addition to the cost of the passport itself. The magistrate determined that "the use of the word 'economy' suggested a low cost fare." *FTC v. Amy Travel*, No. 87 C 6776, slip op. at 27 (N.D. Ill. Feb. 10, 1987). The Y-class airfare, although described as a "full-economy" fare, is actually the highest-priced coach fare available. This was never disclosed to the purchasers of the vacation passports and the magistrate found this was deceptive. Only after a prospective traveler had booked a vacation was the true price disclosed.

The magistrate also found that the wording of the telemarketing scripts created the misleading impression that the cost of the vacation passport equaled the price of the entire vacation package. The magistrate noted that

the script opened with the strong implication that the price was "only \$329.90," reinforced by the false statement that the person was one of a select group of preferred credit card holders and the remark, "At that price, I'm sure you'd like to go . . ."

FTC v. Amy Travel, No. 87 C 6776, slip op. at 26 (N.D. Ill. Feb. 10, 1987).

Finally, the magistrate determined that, upon hearing the script promise that for the stated price, the consumer would receive a voucher entitling purchaser to a vacation package "for a cost not to exceed (1) unrestricted economy airfare," a reasonable consumer listening over the phone would likely believe that the cost of the vacation passport was equivalent to one unrestricted economy airfare. *Id.*



The actual prices of the vacation packages far exceeded the cost of the vacation passport itself, and unrebutted evidence showed that the prices charged by Amy were not bargains. In her findings of fact, the magistrate took note of an example presented by the FTC of a vacation trip from Washington, D.C. to Honolulu. According to the affidavit, on April 28, 1987 the round trip Y-class airfare from Washington to Honolulu was \$1,936 while a full vacation package for two to Waikiki including accommodations for seven nights and airfare was available from another travel agent for \$1,198. The magistrate found that, in light of such facts, the vacation passport was of little actual value; since the sales pitch had created the impression that the vacation passport was a great bargain, the magistrate determined that it was deceptive. The magistrate also found that Weiland and McCann were personally responsible for the management of the operations.

C. The Proceedings Below

In response to numerous consumer complaints about the defendants' operations, the attorneys general of a number of states, as well as the FTC, acted against the defendants.⁴ On August 3, 1987 the FTC filed its complaint, pursuant to section 13(b) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 53(b), claiming the defendants violated section 5 of the FTCA, 15 U.S.C. § 45. The FTC sought preliminary and permanent injunctive relief, an asset freeze, rescission, restitution, and other equitable relief. In its complaint, the FTC alleged that the defendants had engaged in unfair and deceptive marketing practices by misrepresenting and deceptively failing to disclose the true cost of the vacations they sold and misrepresenting their billing practices, including billing customers without authorization.

A temporary restraining order ("TRO") and an order to show cause why a preliminary injunction should not issue

⁴ Judgment decrees were entered against the defendants in Texas, Indiana, Illinois, and Kentucky.



were also entered on August 3. The temporary restraining order froze defendants' assets, except as necessary to pay off obligations to customers, and required that defendants (1) cease any practices alleged to be deceptive and (2) account for all sales, cancellations, refunds, and vacations having to do with vacation passports. The order was later modified to allow for the payment of reasonable living expenses and reasonable attorneys' fees.⁵

After a number of delays and difficulties that eventually resulted in Rule 11 sanctions being levied against defendants' counsel,⁶ trial was held before the magistrate between December 10 and December 16, 1987. The FTC presented several consumers, employees, and an expert as witnesses. Defendants objected to the exclusion of some evidence they attempted to present, including postcards sent to Amy by customers during their trips. The magistrate found that, since the FTC had already stipulated that some customers had taken trips, there was no need for further evidence proving this fact. The magistrate also excluded as irrelevant a witness who had purchased a vacation passport from someone other than the defendants and another witness who had received a passport as a premium for attending a sales presentation.

The magistrate concluded that the defendants had committed deceptive acts in commerce, made representations and omissions, acted in a manner likely to mislead, and actually misled reasonable consumers. The magistrate also found that the misrepresentations, practices, and omissions of defendants were material to the transaction. The magistrate entered a final order of permanent injunction on

⁵ The orders for attorneys' fees were entered under seal. The amount of fees paid is between \$50,000 and \$70,000, though the actual amount will not be specified.

⁶ Counsel for defense was sanctioned by the trial court under Fed. R. Civ. P. 11 and this sanction has also been appealed, *FTC v. Amy Travel*, No. 88-2328. That appeal was consolidated with this one for oral argument, but it will be addressed separately by this court.



May 4, 1988, finding that the FTC had established a violation of the FTCA. The defendants, jointly and severally, were ordered to pay \$6,629,100 to the FTC in redress. Enforcement of that order was stayed pending this appeal.

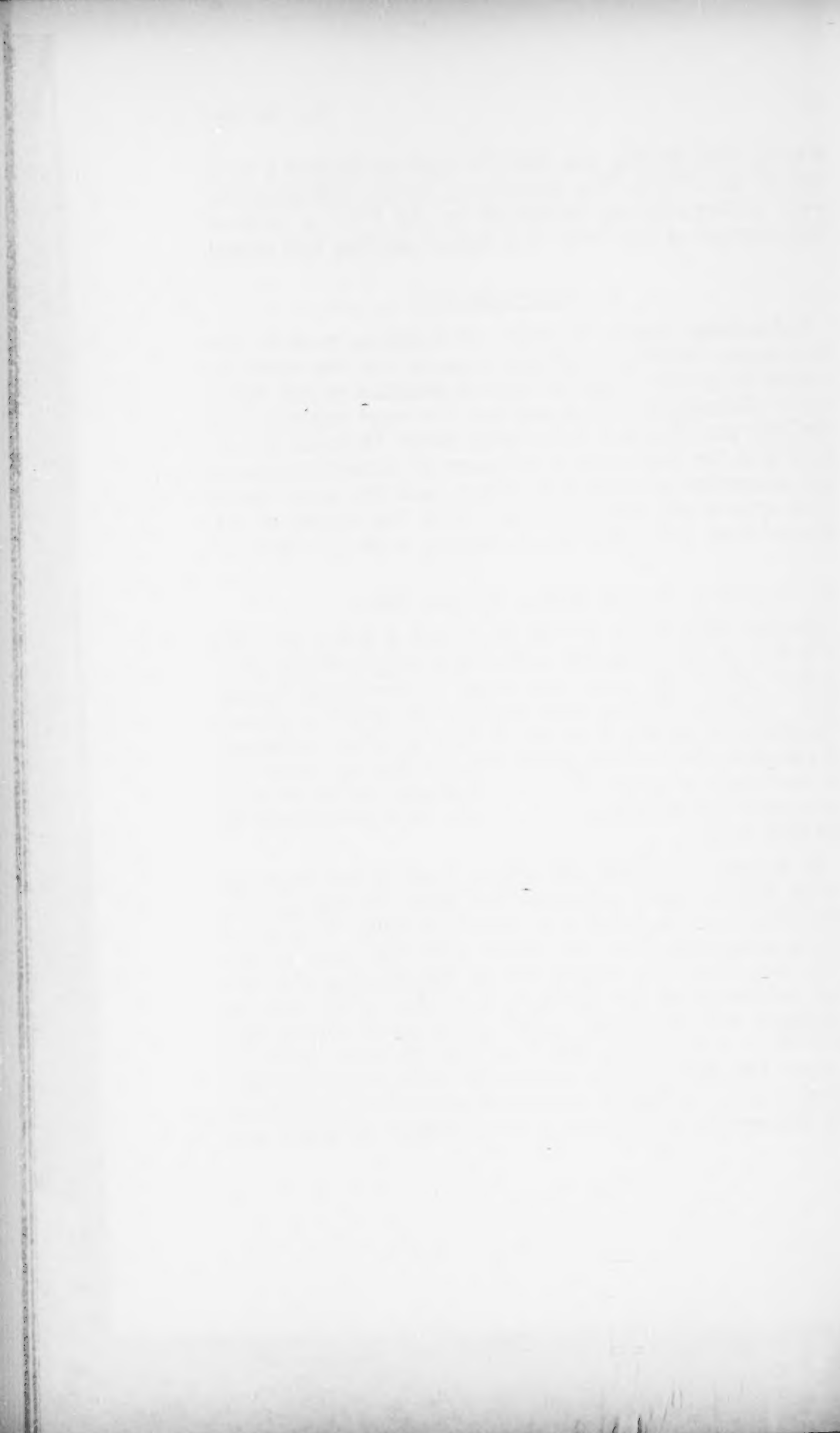
II. DISCUSSION

Defendants dispute a number of decisions made by the trial court. Defendants initially contend that the court exceeded its powers when it imposed penalties on the defendants. Defendants also argue that the court unjustly held McCann and Weiland individually liable. Defendants contend that the magistrate's exclusion of certain testimony, the admission of some depositions, and the asset freeze were errors, and defendants also claim the magistrate exhibited bias and prejudice in dealing with this case.

A. Equitable Powers Under Section 13(b)

Section 13(b) of the FTCA, 15 U.S.C. § 53(b), provides "[t]hat in proper cases the Commission may seek and after proper proof, the court may issue, a permanent injunction." Section 13(b) is often used by the FTC to pursue violations of section 5 of the FTCA or other violations of statutes. Defendants assert that the district court has no authority to grant monetary equitable relief, such as rescission and restitution, in a section 13(b) permanent injunction action.

In making this claim, defendants point to the language of the statute itself and argue that since the statute only specifies that the court shall have authority to grant a permanent injunction, the court's authority goes no farther than that. The magistrate, in determining that she had authority to use ancillary equitable relief such as rescission and restitution, relied on the Ninth Circuit case of *FTC v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982). In *Singer*, the Ninth Circuit found that because section 13(b) gives a court authority to grant a permanent injunction, the statute by implication gives authority "to grant any



ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *Singer*, 668 F.2d at 1113. Defendants argue that *Singer* should not be adopted by this court, claiming that the clear language of the statute should point the way to refusing to give the district court ancillary equitable powers.

Defendants' efforts to curtail the power of the district court in this case have been thwarted by some recent decisions of this court that make clear the breadth of the equitable authority granted by section 13(b). In *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988), this court adopted the Ninth Circuit's position in *Singer* that the granting of permanent injunctive power "also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *World Travel*, 861 F.2d at 1026 (quoting *Singer*, 668 F.2d at 1113). In *World Travel*, this court held that the district court had the authority under section 13(b) to grant interlocutory relief as well as permanent injunctive relief. *Id.* In *FTC v. Elders Grain, Inc.*, Nos. 88-2493 & 88-2494, slip op. (7th Cir. Jan. 30, 1989), this court specifically found that a district court could order rescission in a section 13(b) proceeding. In *Elders*, we dealt with whether the section 13(b) grant of preliminary injunctive authority carried with it a grant of other equitable powers. We found that such a granting of power "carries with it the power to issue whatever ancillary equitable relief is necessary to the effective exercise of the granted power." *Id.* at 11.

This reasoning applies with equal force to the issue of whether the granting of permanent injunctive powers also carries with it the power to invoke ancillary equitable relief. Rescission and restitution are proper forms of ancillary relief. All other circuits that have dealt with this issue have found that section 13(b) grants the authority to issue other necessary equitable relief. *See, e.g., FTC v.*



United States Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984) (district court has full equitable powers incident to express authority to issue permanent injunction under section 13); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (permanent injunctive power also gives authority for ancillary equitable relief); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982) (grant of jurisdiction in section 13(b) includes authorization for district court to exercise full range of equitable remedies traditionally available). Defendants' reliance on this court's opinion in *JS & A Group, Inc.*, 716 F.2d 451 (7th Cir. 1983), is misplaced. *JS & A Group* did not address the question of whether the provision allowing the district court to enter a permanent injunction also permitted ancillary equitable relief—that case only dealt with whether the FTC must begin cease-and-desist proceedings prior to obtaining a section 13(b) permanent injunction. *World Travel*, 861 F.2d at 1026. We hold that in a proceeding under section 13(b), the statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers.

B. Exclusion of Evidence

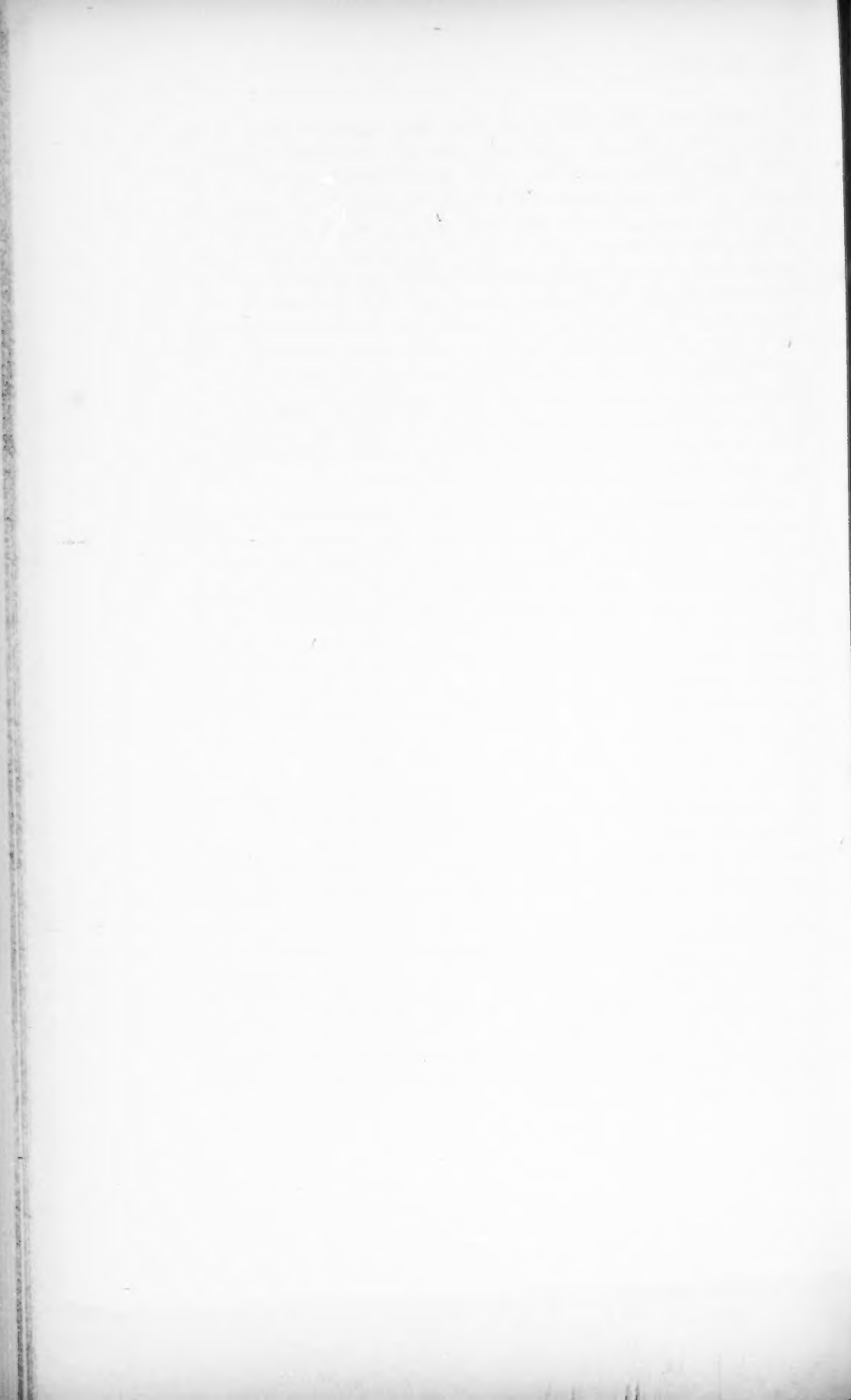
Defendants next claim that the magistrate erred in excluding certain evidence during the trial for lack of relevancy and other reasons. The trial court excluded some testimony by "satisfied customers" of Amy, excluded certain expert witness testimony, and excluded testimony concerning advice given by counsel to defendants concerning their operation. The trial court has substantial discretion in making these types of evidentiary rulings and we must give the magistrate great deference. This court will not overturn these evidentiary decisions in the absence of a clear abuse of discretion. *Charles v. Daley*, 749 F.2d 452, 463 (7th Cir. 1984), *appeal dismissed sub nom. Diamond v. Charles*, 476 U.S. 54 (1986).



Defendants first contend that they should have been allowed to present testimony from customers satisfied with their vacations. The trial court excluded the testimony of two witnesses who took vacations arranged by Amy. The court found that the sales presentations given to the two witnesses were not made by any of the defendants, but were attributable to independent third parties. The magistrate reasonably concluded that the use of Amy to arrange the trips did not make the testimony relevant since the complaints at issue in this case concerned the representations and omissions made by the defendants in connection with the sale of the vacation packages. Performance of the travel obligations or any failure to perform was not at issue and the trial court did not abuse its discretion in excluding the testimony.

Similar reasoning was used by the magistrate to exclude postcards and letters sent to Amy by customers while on their vacations. Defendants argue that unsolicited postcards from satisfied customers show that customers were not deceived. Defendants misunderstand the proof that must be offered by the FTC. Contrary to defendants' claims, the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense under the FTCA. *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960); *Erickson v. FTC*, 272 F.2d 318, 322 (7th Cir.), *cert. denied*, 362 U.S. 940 (1960). The magistrate correctly acknowledged the existence of satisfied customers in computing the amount of defendants' liability—customers who actually took vacation trips were excluded when the magistrate computed the amount of restitution awarded.⁷

⁷ It was unclear how many customers who actually took trips were dissatisfied with their vacations. The difficulties involved in determining how much relief should be given to dissatisfied customers prompted the magistrate to limit the relief to those customers who received nothing of value for the price of the vacation passport. Customers, satisfied or unsatisfied, who took trips were excluded from the computation of relief and that decision is not at issue on this appeal.



However, the existence of those customers is not relevant to determining whether consumers were deceived and the magistrate was correct to exclude the postcards and letters.

Defendants also criticized the trial court's exclusion of certain expert testimony. The trial court "has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States*, 418 U.S. 87, 108 (1974); see also *Spesco v. General Elec. Co.*, 719 F.2d 233, 238 (7th Cir. 1983); *Grindstaff v. Coleman*, 681 F.2d 740, 743 (11th Cir. 1982). Steve Frenzl was offered by defendants as an expert in travel marketing. During Frenzl's testimony, defense counsel asked whether defendants' sales practices were "deceptive or misleading." The magistrate properly prevented Frenzl from answering since the question called for Frenzl to render a legal opinion. Mr. Frenzl was also prevented from commenting on consumer perception of the sales pitch. The magistrate determined that Frenzl did not possess the necessary expertise to give his opinion on this issue. See Fed. R. Evid. 104(a), 702. The court found that testimony on how consumers would react to sales material should be given by an expert in consumer psychology or consumer behavior. The magistrate did not abuse her discretion in making this determination. The magistrate also correctly excluded testimony from a travel law expert on other advertising methods used by travel companies and refused to allow one of defendants' employees to give his opinion on whether the defendants' methods were deceptive or unfair. The issue of the magistrate's exclusion of certain evidence relating to advice of counsel is premised on the individual liability of the defendants and will be dealt with separately.

C. Individual Liability

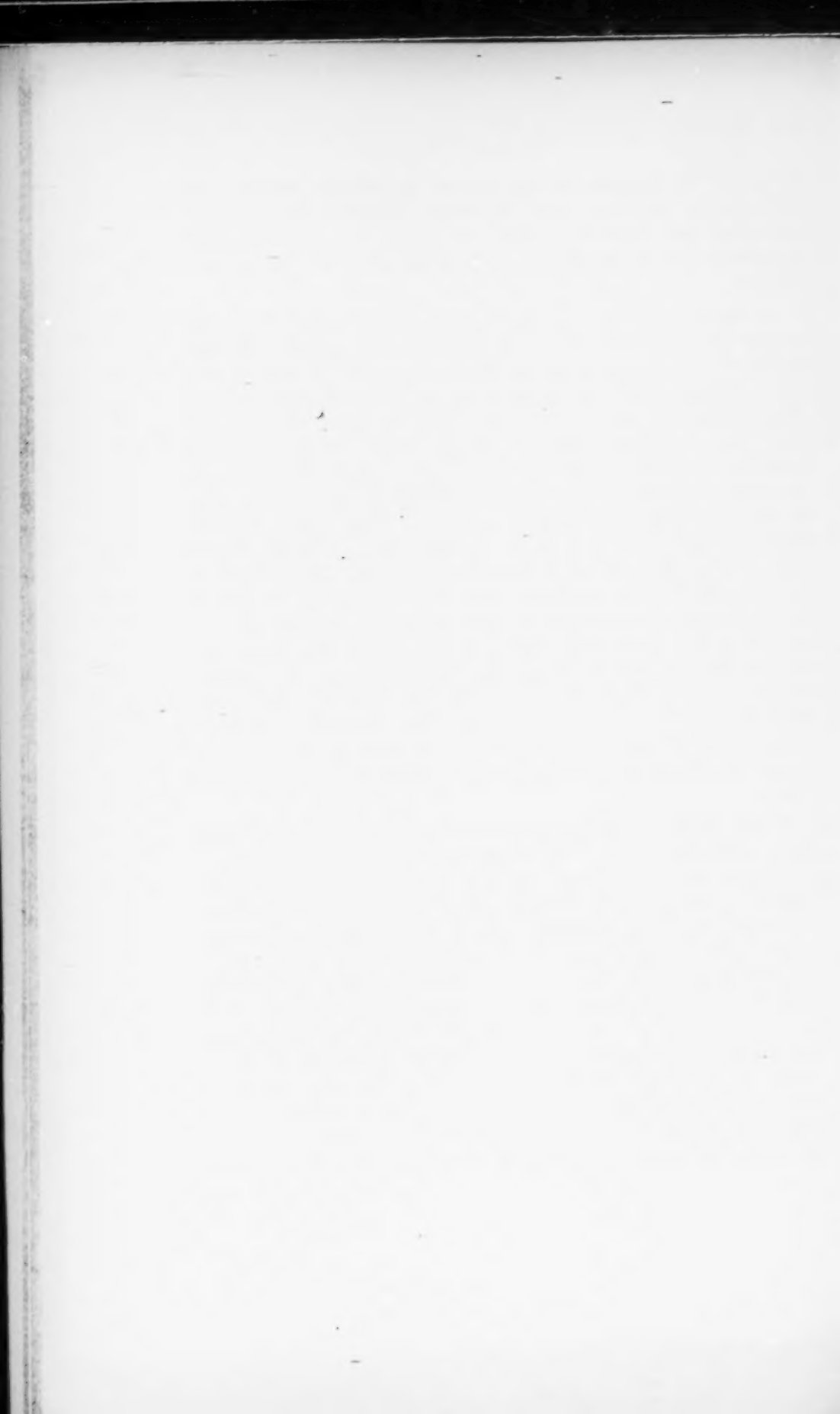
Defendants now challenge the decision of the magistrate to hold all of them jointly and severally liable for restitution to consumers. Defendants claim that the FTC failed



to meet its burden for imposing individual liability on defendants McCann and Weiland. Defendants also argue that the magistrate did not apply the correct legal standard for determining individual liability under the FTCA.

An individual may be held liable under the FTCA for corporate practices if the FTC first can prove the corporate practices were misrepresentations or omissions of a kind usually relied on by reasonably prudent persons and that consumer injury resulted. *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282 (D. Minn. 1985). Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them. *Kitco*, 612 F. Supp. at 1292; *FTC v. H.N. Singer, Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,011 at 70,618-19 (N.D. Cal. 1982). Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. *Kitco*, 612 F. Supp. at 1292; see e.g., *Consumer Sales Corp. v. FTC*, 198 F.2d 404, 408 (2d Cir. 1952), cert. denied, 344 U.S. 912 (1953). The FTC must then demonstrate that the individual had some knowledge of the practices. The knowledge requirement is the key issue in this case.

While acknowledging that intent per se is not a necessary element in an FTC violation, see *United States v. Johnson*, 541 F.2d 710, 712 (8th Cir. 1976), cert. denied, 429 U.S. 1093 (1977) (When unfair trade practices occur, "liability for civil penalties arises without a need for any showing that the practices were intentional or malicious."); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 308-09 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963), the defendants are asking this court to apply a higher standard of knowledge in cases where individuals could be held liable for monetary restitution. Defendants correctly point out that the cases cited for the proposition that intent to deceive is not a necessary element of an FTC violation all dealt



with cease-and-desist orders or injunctions. In such cases, corporations and individuals are being directed to refrain from certain conduct. This case involves holding an individual liable for monetary restitution and defendants argue that it would be better to find bad faith before imposing such a sanction. See *Porter & Dietsch*, 605 F.2d at 309 (extent of party's culpability should affect nature of relief granted). Some district courts in other circuits have held that to find an individual liable for restitution under section 13(b), the FTC must prove that the defendant knew or should have known that the conduct was dishonest or fraudulent. See *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69,706-07 (N.D. Cal. 1983) (to hold defendant liable for redress under section 13(b), defendant's activity must rise to the level of fraud or dishonesty); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985) (to obtain monetary equivalent of rescission, FTC must prove defendant had knowledge that corporation or its agents "engaged in dishonest or fraudulent conduct"); *FTC v. Atlantex Assoc.*, 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,255 (S.D. Fla. 1987).

We find that imposing a requirement that the FTC prove subjective intent to defraud on the part of the defendants would be inconsistent with the policies behind the FTCA and place too great a burden on the FTC. The FTC is required to establish the defendants had or should have had knowledge or awareness of the misrepresentations, *Kitco*, 612 F. Supp. at 1292, but that knowledge requirement may be fulfilled by showing that the individual had "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Kitco*, 612 F. Supp. at 1292; see also *International Diamond*, 1983-2 Trade Cas. (CCH) at 69,707. Also, the degree of participation in business affairs is probative of knowledge. *International Diamond*, 1983-2 Trade Cas. (CCH) at 69,707-08.



In analyzing the facts of this case under this standard, the magistrate noted that behind the power to hold individuals liable for corporate actions is a belief that "one may not enjoy the benefits of fraudulent activity and then insulate one's self from liability by contending that one did not participate directly in the fraudulent practices." *FTC v. Amy Travel*, No. 87 C 6776, slip op. at 32 (N.D. Ill. Feb. 10, 1987). With this policy in mind, the magistrate determined that the FTC had met its burden. The magistrate found that

[a]lthough it appears that McCann and Weiland themselves did not make sales calls to consumers, the level of admitted participation by McCann and Weiland in the business more than adequately supports a finding that these individuals had knowledge of the practices at issue. McCann and Weiland designed and on a day-to-day basis oversaw the sales operation with the clear purpose of inducing consumer purchases of their vacation passports. Having written the deceptive scripts, McCann and Weiland certainly knew of the material misrepresentations and omissions upon which the scripts were based. They were aware of the high volume of customer complaints and the excessive chargebacks which resulted from the use of the scripts and from the embellishing misrepresentations employed by the telemarketers in deviation from the scripts. Second, by their own admissions, as principal shareholders and officers of the closely held defendant corporations, McCann and Weiland admittedly had authority to control the deceptive sales operation and all other aspects of their business.

FTC v. Amy Travel, No. 87 C 6776, slip op. at 32.

These factual findings made by the trial court must be analyzed under the clearly erroneous standard. Fed. R. Civ. P. 52(a). See *In re Muller*, 851 F.2d 916, 920 (7th Cir. 1988) ("Only if we are 'left with the definite and firm conviction that a mistake has been committed,' may we disturb the court's findings.") (citing *Anderson v. Bessemer*, 470 U.S. 564, 573 (1985)). It is clear that McCann



and Weiland were the ones behind the vacation passport scheme. They were the principal shareholders and officers of the corporations. They created the businesses, opened new ones, wrote telemarketing scripts, and hired personnel. They controlled the financial affairs of the companies and reviewed the sales reports and other information. McCann oversaw the daily sales operation and consulted with Weiland regularly. As authors of the sales scripts, they were certainly aware of the misrepresentations contained in them. If they were unable to see trouble coming by looking at the scripts, it is unlikely they missed the signals sent by the high volume of consumer complaints and the excessive credit card chargebacks.

Defendants offer another defense to this conclusion. They contend that, contrary to appearances, they did not intend to create a fraudulent scheme and they offered evidence to show that they took pains to avoid tangling with the law. The magistrate took note of some efforts by defendants to discourage deviations from approved scripts and clear up problems with credit card charges, but found they were grossly inadequate and did little to stem the tide of consumer dissatisfaction. The defendants offered other justifications for their actions. For instance, Weiland claimed that salespeople withheld the actual price of the vacation package from consumers because the future price of the airline ticket was unavailable at the time of sale. The magistrate discounted this claim, stating that it would have been easy to give the customer a reasonable estimate of the cost and concluding that the salespeople withheld the actual price to raise consumer expectations about the value of the vacation passport. The magistrate found that whatever efforts Weiland and McCann claim to have made were ineffective as shown by the high volume of consumer complaints and credit card chargebacks.

Defendants strongly argue that their efforts to gain approval from counsel for their activities demonstrate they did not have the necessary knowledge that they were engaging in deceptive practices. Defendants had attorneys review their script and office policies to make certain they



were within the boundaries of the law.⁸ The magistrate correctly found that the blessing of an attorney did not make the telemarketing scripts truthful. Obtaining the advice of counsel did not change the fact that the business was engaged in deceptive practices. The magistrate was satisfied that the FTC had proven that defendants had sufficient knowledge to find them individually liable. The court determined that reliance on advice of counsel was not a valid defense on the question of knowledge; counsel could not sanction something that the defendants should have known was wrong. The defendants wrote or reviewed many of the scripts that were found to be deceptive and they were undoubtedly aware of the avalanche of consumer complaints. The trial court's conclusion that McCann and Weiland had the necessary knowledge and control to be held individually liable was not clearly erroneous.⁹

D. The Freeze on Assets

Defendants now contend that the freeze on assets by the TRO and the subsequent permanent injunction prevented them from paying attorneys' fees. They argue that such a freeze violates defendants' constitutional rights by

⁸ Defendants claim the trial court excluded important evidence relating to advice of counsel. An examination of the record and the trial court's opinion shows that the magistrate was sufficiently aware of defendants' efforts to get counsel's approval of corporate practices. The magistrate's exclusion of certain testimony relating to advice of counsel on the basis of relevancy was not clearly erroneous. *Charles v. Daley*, 749 F.2d 452, 463 (7th Cir. 1984).

⁹ At oral argument, defendants raised a new issue concerning the assessment of individual liability. Defendants argued that it was inappropriate to impose the entire amount of restitution on the individual defendants. The basis for this argument was unclear since it was not raised by the parties in the briefs. We find no merit in this argument and affirm the decision of the trial court to assess all defendants for the full amount of restitution.



restricting their choices in obtaining representation. See *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); see also *Caplin & Drysdale v. United States*, 837 F.2d 637 (4th Cir.) (en banc), cert. granted, 109 S. Ct. 363, 102 L. Ed. 2d 352 (1988); but see *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.), cert. granted, 109 S. Ct. 363, 102 L. Ed. 2d 353 (1988). While the issue of whether an asset freeze violates constitutional rights to counsel or due process is interesting, it is unnecessary for this court to reach the question. The trial court modified the asset freeze to allow for reasonable attorneys' fees and expenses. Counsel received between \$50,000 and \$70,000 for his time and effort.¹⁰ The defendants have given us insufficient reason to alter the amount of fees awarded. The magistrate was in the best position to determine what constituted a reasonable fee in this case and we will not disturb her decision. See *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031-32 (7th Cir. 1988).

E. Admission of Consumer Affidavits

Defendants dispute the trial court's decision to admit a number of consumer affidavits. On a motion *in limine*, the FTC introduced a number of affidavits from consumers who purchased travel vouchers from the defendants.¹¹ The affidavits were admitted to show actual consumer harm had resulted from the defendants' activities. The trial

¹⁰ The actual amount of attorneys' fees awarded cannot be specified since the orders awarding the fees were entered under seal. Counsel for defendants did state at oral argument that the amount was closer to \$70,000 than to \$50,000.

¹¹ Defendants also contest the admission of a large number of consumer complaint letters. These letters were admitted for the limited purpose of showing that defendants were on notice of potential problems with their operations. The letters were not admitted for the truth of their statements and they pose no hearsay problems. Fed. R. Evid. 404(b).



court ruled that the affidavits fell within the residual exception to the hearsay rule. Fed. R. Evid. 803(24).¹²

In determining the correctness of the trial court's admission of evidence under the residual exception, we must give the trial court "a considerable measure of discretion." *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979). Hearsay offered under Rule 803(24) must satisfy five criteria to be admissible: the statement must be sufficiently trustworthy, material, probative, in the interests of justice, and given to opposing parties with the proper notice. *Id.* at 292-95. Turning to these requirements, it is clear that these affidavits will fall within the residual exception and the trial court did not abuse its discretion by admitting them. The affidavits possess sufficient guarantees of trustworthiness; each was made under oath subject to perjury penalties and the affiants describe facts about which they have personal knowledge—their contacts with defendants. The evidence is important to the issue of whether there was actual consumer injury from defendant's action and the affidavits would be probative of that fact. The interests of justice are served by allowing the affiants to submit affidavits instead of requiring their appearance in court. The defendants ran a nation-wide telemarketing operation and it would be cumbersome and unnecessarily expensive to bring all the consumers in for live testimony. See *Kitco*, 612 F. Supp. at 1294 (too expensive and time consuming to get witnesses from all over

¹² The FTC claims a separate ground for admitting the affidavits. Apparently, the FTC had made a request to defendants for admissions in the subject matter of the affidavits. In the opinion of the trial court, defendants responded improperly to the request. The trial court directed defense counsel to reevaluate the response to the requests for admission. Defense counsel did not review his responses and the court then admitted all matters that the FTC had requested, including the contested affidavits. The admission of these affidavits cannot be sustained upon that ground alone. The affidavits must fall within a hearsay exception to be admitted properly.

country; affidavits serve interests of justice). Defendants were also given proper notice of the affidavits—they even had the chance to question the affiants themselves, but they chose not to avail themselves of the opportunities. The trial court's decision to admit these affidavits was not an abuse of discretion.¹³ However, even if this evidence did not fall within the residual exception, we would also find that the admission of this evidence was not prejudicial to the defendants. Other evidence in the record adequately established that there was actual harm to consumers. The evidence presented in the affidavits was cumulative and had little effect on the determination of actual harm.

III. CONCLUSION

For the forgoing reasons, the decision of the trial court is **AFFIRMED**.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

¹³ Defendants also claimed that the trial court exhibited sufficient bias and prejudice to require reversal. We find no merit to this argument. Friction between court and counsel does not constitute bias. *Hamm v. Board of Regents*, 708 F.2d 647, 651 (11th Cir. 1983).



EXHIBIT 4



§ 53. False advertising; injunction; grounds

(a) Power of commission; jurisdiction of courts. Whenever the Commission has reason to believe--

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12 [15 USCS § 52], and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5 [15 USCS §45], and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5 [15 USCS § 45], would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted



without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(b) Temporary restraining orders; preliminary injunctions. Whenever the Commission has reason to believe

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed

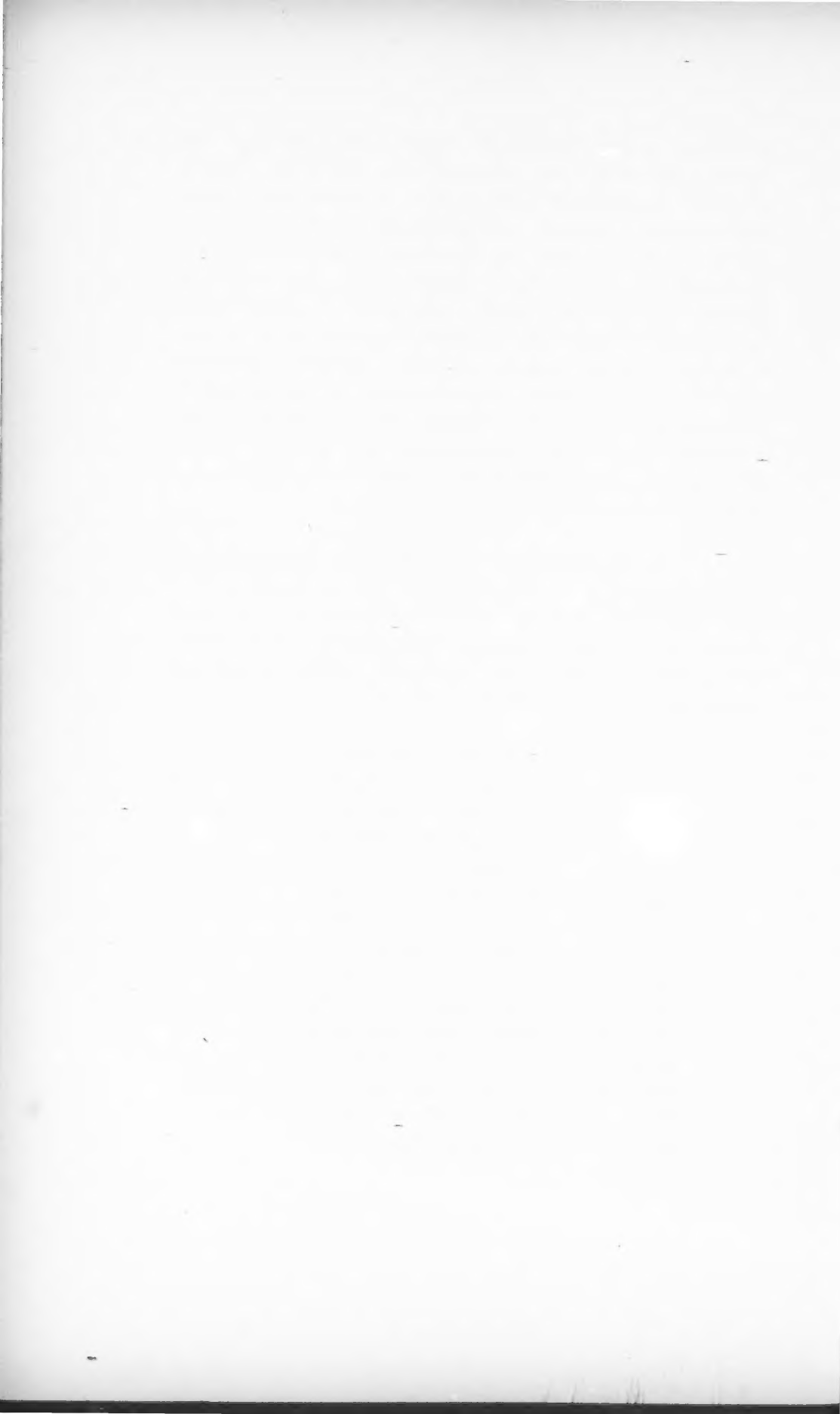


within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(c) Exception of periodical publications. Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals--

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an



injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order of injunction.

(Sept. 26, 1914, c. 311 § 13, as added Mar. 21, 1938, c. 49 § 4, 52 Stat. 115; Nov. 16, 1973, P. L. 93-153, Title IV, § 403(f), 87 Stat. 592)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments (with effective dates):

1973. Act Nov. 16, 1973 (effective 11/16/73), Sec. 408(f) redesignated former subsec. (b) to be subsec. (c), and inserted new subsec. (b).



EXHIBIT 5



§ 57b. Consumer redress

(a) Civil actions by Commission for violations of rules and final cease and desist orders.

(1) If any person, partnership, or corporation violates any rule under this Act [15 USCS §§ 41 et seq.] respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a) [15 USCS § 45(a)]), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1) [15 USCS § 45(a)]) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of



a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Relief. The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnership, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c) Findings of Commission as conclusive in civil action; notice of action to injured parties.

(1) If (A) a cease and desist order issued under section 5(b) [15 USCS § 45(b)] has become final under section 5(g) [15 USCS § 45(g)] with respect to any person's, partnership's, or



corporation's rule violation or unfair or deceptive act or practice, and (b) an action under this section is brought with respect to such person's partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 5(b) [15 USCS § 45(b)] with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's finding shall not be conclusive, or (ii) the order became final by reason of section 5(g)(1) [15 USCS § 45(g) (1)], in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.



(d) Limitations. No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 5(b) [15 USCS § 45(b)] which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.


(e) Supplemental remedies; additional authority of Commission. Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

(Sept. 26, 1914, c. 311, § 19, as added Jan. 4, 1975, P. L. 93-637, Title II, § 206(a), 88 Stat. 2201.)



CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Appendix was served via U. S. Mail to Mr. Melvin Orleans and Mr. Larry Hodapp, Attorneys at Law, Federal Trade Commission, 6th and Penn. Avenue, N.W., Washington, D.C. 20580 and the Solicitor General, Department of Justice, Washington, D.C. 20530 on this the 05th day of August, 1989.


Robert S. Bennett

(3)
No. 89-283

Supreme Court, U.S.
FILED

OCT 16 1989

JOSEPH P. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMY TRAVEL SERVICES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), which expressly authorizes a court to issue "a permanent injunction," implicitly forbids a court from awarding other ancillary equitable relief.

2. Whether the district court erred in holding the individual petitioners liable for the unlawful conduct of the corporations they owned and controlled where they had knowledge of the violations, participated in them, and failed to bring them to a halt.

3. Whether the district court erroneously excluded testimony that the individual petitioners relied on the advice of counsel.

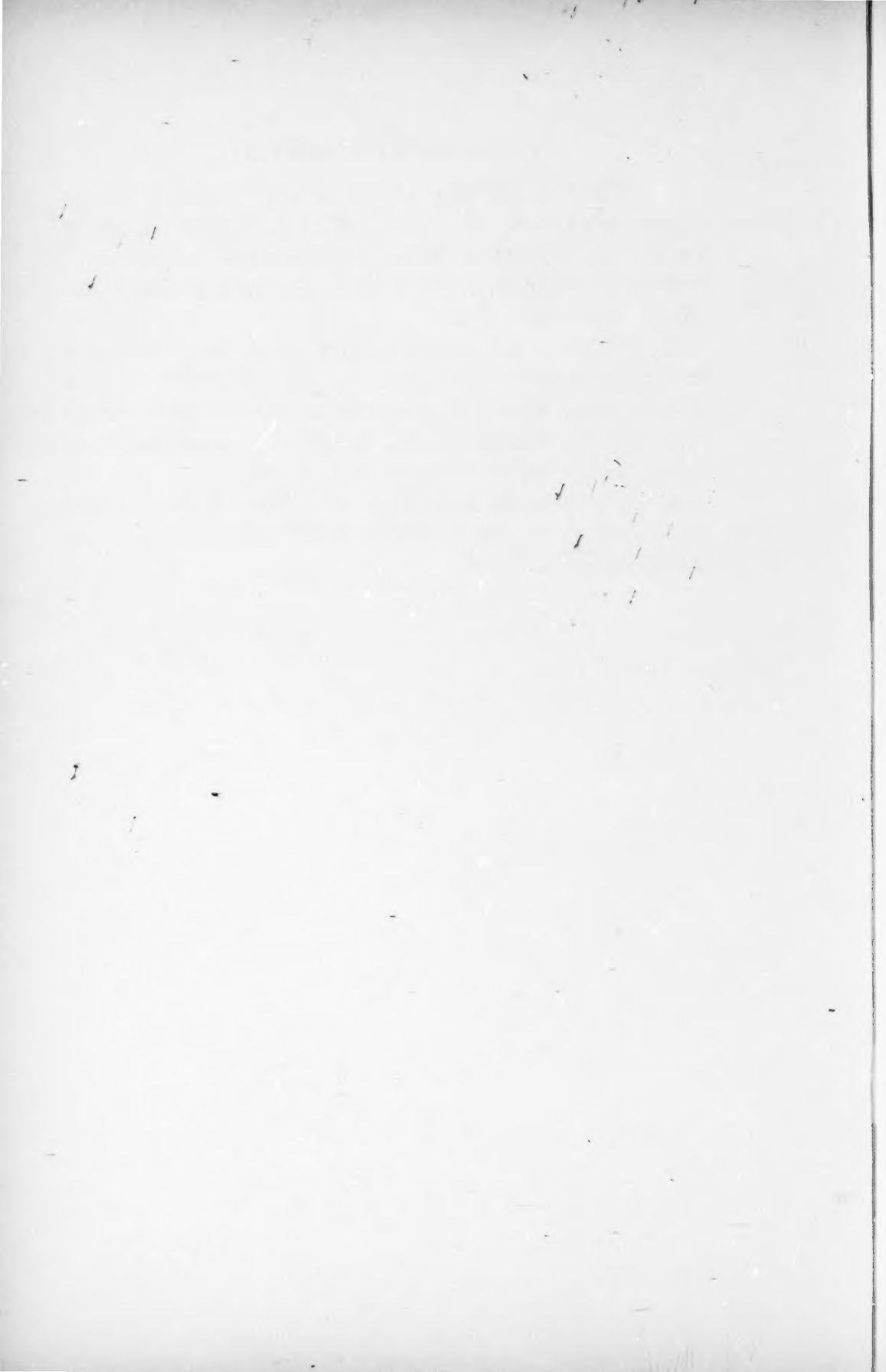


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FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 118, Exh. 3, is reported at 875 F.2d 564. The district court's findings of fact, conclusions of law, and final order, Pet. App. 1-117, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1989. The petition for a writ of certiorari was originally filed on July 17, 1989. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the Northern District of Illinois found that petitioners deceived consumers in violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45. The court issued a permanent injunction forbidding petitioners from committing further violations of the FTC Act and ordered petitioners to pay \$6,629,100 in restitution to consumers. Pet. App. 1-117. The court of appeals affirmed.

1. Petitioners are the corporations Amy Travel Service, Inc. (Amy), Resort Performance, Inc., and Resort Telemarketing, Inc., and the individuals Thomas P. McCann (McCann) and James F. Weiland (Weiland).

In 1985, petitioners McCann and Weiland formed a business to sell travel certificates, also known as "vacation passports." Each passport consisted of two pages of written material and described vacation packages to nine different resort locations, including Acapulco, Jamaica, Hawaii, and London, among others. The passport stated that it "entitle[d] the adult holder(s) to receive two round-trip air tickets plus lodging for 8 days and 7 nights for the price not to exceed one unrestricted round-trip, standard, all-year, full-economy (Y-class) airfare." Petitioners sold their passports to consumers for \$289 to \$329. Pet. App. 10, 13-18, Exh. 3, at 2, 3-4 (emphasis omitted).

In 1986, McCann and Weiland opened a "telemarketing" office to sell vacation passports by telephone directly to consumers. McCann and Weiland eventually opened eight additional telephone sales rooms. All of these offices were managed by McCann

and Weiland, and all were operated as a single entity in all material respects. Pet. App. 10-12, Exh. 3, at 2-3.

To promote telephone sales, petitioners McCann and Weiland developed scripts to be used by their sales agents. The basic script falsely represented that the offer was being made to only a few special customers and suggested that the consumer was required to "qualify," a hurdle that was easily surmounted by answering yes to a few simple questions. That script then told the consumer that he or she was being offered a "special vacation voucher to Hawaii for only \$329.90." Later on, that script indicated that the price of the voucher entitled the consumer to a fully paid vacation for eight days and seven nights, plus two round-trip airfares, at a cost not to exceed one "unrestricted round-trip (Y-class) full economy airfare." By design, the script did not disclose the cost of the Y-class airfare and, therefore, concealed the total cost of the vacation. Pet. App. 18-22, Exh. 3, at 4-7 (emphasis omitted).¹

Petitioners' marketing practices misled consumers about the true cost of the vacation package. Many consumers reasonably believed that the cost of the entire package was the \$289-\$329 cost of the passport, which they also understood to be the price of one unrestricted economy airfare. Even consumers who recognized that there was an additional charge—up to the cost of a "full-economy (Y-class) airfare"—

¹ Moreover, many of the sales scripts used by petitioners deviated from the basic script described above and falsely represented to the consumer that "you have been computer selected thru [sic] a major credit card company to be offered a fully paid vacation to Hawaii, for only \$289.90." Pet. App. 23, Exh. 3, at 7 (emphasis omitted).

were misled into believing the trip was a bargain. In fact, unbeknownst to most consumers, the Y-class airfare, far from being an "economy" fare as characterized by petitioners, is the highest priced coach airfare available. Pet. App. 72-73, Exh. 3 at 9. Indeed, a Y-class airfare often costs three or more times as much as other fares and two to five times as much as the passport. Because petitioners concealed this fact prior to purchase, it was not until most consumers had actually purchased their passport and sought to book their flight and accommodations that they learned the actual cost of their vacation and realized how expensive it was in relation to other readily available alternatives.² This concealed cost helps explain why, although approximately 60,000 passports were sold, only 12,000 to 13,000 trips were taken. Petitioners' activities generated gross revenues of about \$1.5 million in 1986 and \$4.5 million in 1987. Pet. App. Exh. 3, at 8.

Petitioners were well aware from the inception of their scheme that they were deceiving consumers. Customer complaints about misrepresentations began almost immediately. In addition, large numbers of consumers disputed the charges made to their accounts, resulting in chargebacks to petitioners' bank accounts when consumers refused to pay. A number of banks terminated petitioners' accounts because of these consumer complaints and chargebacks. One

² For example, the round-trip Y-class airfare from Washington, D.C. to Honolulu on a particular date was \$1,936 (not including the approximately \$300 cost of the passport). At the same time, a full vacation package for two to Waikiki, including accommodations for seven nights and airfare, could be purchased from a legitimate travel agent for \$1,198. Pet. App. 50-52, 70-73, 78-79, Exh. 3, at 9-10; see Pet. App. 25-36.

bank eventually suffered more than \$700,000 in chargebacks. Pet. App. 89, 91, Exh. 3, at 8-9.

2. On August 3, 1987, the Federal Trade Commission (Commission) filed a complaint, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), alleging that petitioners were engaged in unfair and deceptive marketing practices in violation of Section 5 of that Act, 15 U.S.C. 45. Pet. App. Exh. 3, at 10.

After a one-week trial, the district court (by a designated magistrate) found petitioners to have engaged in deceptive practices by (1) misrepresenting and deceptively failing to disclose the full cost of their vacations and (2) misrepresenting their billing practices and billing consumers without authorization. The court entered an order permanently enjoining petitioners from engaging in those practices, rescinding the outstanding, unused vacation passports, and requiring restitution of \$6 629,100, which represented the amount of money petitioners collected from consumers for unused passports. The court held petitioners jointly and severally liable for the restitution. Pet. App. Exh. 3, at 11-12. See Pet. App. 1-117.

3. The court of appeals affirmed. First, it rejected petitioners' challenge to the authority of the district court to award monetary equitable relief (*i.e.*, rescission and restitution) ancillary to a permanent injunction. The court observed that "[a]ll other circuits that have dealt with this issue have found that section 13(b) grants the authority to issue other necessary equitable relief." Pet. App. Exh. 3, at 13. Relying on the decisions of those other circuits as well as its own precedents, the court of appeals held that Section 13(b) authorized the award of ancillary equitable relief such as rescission and restitution. Pet. App. Exh. 3, at 12-14.

The court of appeals also rejected petitioners' contention that the magistrate erred by holding the individual petitioners jointly and severally liable. It found that the individual petitioners knew or should have known of the unlawful practices perpetrated by the corporations they managed and controlled, and either participated directly in them or had the authority to stop them and failed to do so. Pet. App. Exh. 3, at 16-21.

In addition, the court of appeals rejected petitioners' claim that the magistrate erred by excluding certain evidence that they relied on the advice of counsel. According to the court, "[t]he magistrate correctly found that the blessing of an attorney did not make the telemarketing scripts truthful"; "counsel could not sanction something that the [petitioners] should have known was wrong." Pet. App. Exh. 3, at 21. In the court's view, the record and the magistrate's opinion demonstrated that "the magistrate was sufficiently aware of [petitioners'] efforts to get counsel's approval" and did not err in excluding certain testimony as irrelevant. *Id.* at 21 n.8.³

ARGUMENT

1. Petitioners maintain that the district court lacked authority to order restitution under Section 13(b) of the FTC Act, 15 U.S.C. 53(b). Pet. 10-55. That Section provides that "in proper cases the Commission may seek, and after proper proof, the court

³ The court of appeals also rejected petitioners' contentions that the magistrate erred in excluding certain evidence, Pet. App. Exh. 3, at 14-16; that an asset freeze prevented them from paying attorney's fees, *id.* at 21-22; and that the magistrate erred in admitting consumer affidavits, *id.* at 22-24. Petitioners do not seek further review of those issues.

may issue, a permanent injunction." Petitioners argue that by expressly authorizing a permanent injunction, the statute impliedly forbids the award of any other equitable relief, including the rescission and restitution ordered in this case. Pet. 16. Petitioners' exclusion-by-implication reasoning is contrary to this Court's decisions construing statutes authorizing equitable remedies.

a. It is well established that where Congress allows resort to equity for enforcement of a statute, all the inherent equitable powers of the district court are available for the proper and complete exercise of the court's equitable jurisdiction, unless the statute explicitly or by inescapable inference limits the scope of that jurisdiction. *Renegotiation Board v. Banner-craft Co.*, 415 U.S. 1, 19-20 (1974); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-291 (1960); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942). As this Court stated in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946):

Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. * * * [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.

Id. at 398 (internal quotation marks and citations omitted). Petitioners concede that *Porter* provides the applicable rule of construction in this case. Pet. 21-22.

Section 13(b) expressly authorizes permanent injunctive relief and neither expressly nor implicitly excludes the award of ancillary equitable relief. Consistent with this Court's decisions, every court that has considered the question—including three courts of appeals—has held that the district court is authorized to grant ancillary equitable relief under Section 13(b). *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-1435 (11th Cir. 1984); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1110-1112 (9th Cir. 1982); *FTC v. Atlantex Associates*, 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,253 (S.D. Fla. 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989); *In re Evans Products Co.*, 1986-1 Trade Cas. (CCH) ¶ 67,113 at 62,722-62,723 (S.D. Fla. 1986); *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,506 at 68,457-68,458 (N.D. Cal. 1983); *FTC v. Virginia Homes Manufacturing Corp.*, 509 F. Supp. 51, 54-55 (D. Md.), *aff'd*, 661 F.2d 920 (4th Cir. 1981) (Table). See *FTC v. Evans Products Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985).

In this case, the district court determined that “[t]his record demonstrates a proper case for restitution to consumers who were billed either without their knowledge or consent or with consent but based on false representations made to them.” Pet. App. 95. The court calculated the amount of restitution by adding the number of consumers who requested refunds but did not receive them and the number of consumers who purchased passports and requested vacations but did not travel, and then multiplying this sum by the estimated average cost of a vacation passport. *Id.* at 108. The district court’s restitution award is unquestionably fair. As the court of appeals noted, the magistrate “limit[ed] the relief to those customers who received nothing of value for the price of the vacation passport. Customers, satisfied or unsatisfied, who took trips were excluded from the computation of relief.” Pet. App. Exh. 3, at 15 n.7.

b. Petitioners’ reading of Section 13(b) to exclude by implication ancillary equitable relief contradicts the *Porter* principle. For example, petitioners emphasize that the statute authorizes only a “permanent injunction.” But their effort to characterize that language as narrow, Pet. 22-26, simply disregards the relevant canon of construction. That language, like the language of other statutes authorizing a particular equitable remedy, invokes the full equitable jurisdiction of the district court. See, e.g., *CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir.), cert. denied, 442 U.S. 921 (1979); *FSLIC v. Dixon*, 835 F.2d 554, 560-563 (5th Cir. 1987); *ICC v. B & T Transportation Co.*, 613 F.2d 1182, 1184-1186 (1st Cir. 1980); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.), cert. denied, 404 U.S. 1005 (1971). For the same reason, petitioners’ reliance on minor variations in language is misplaced: as long as the statute

authorizes an equitable remedy, as Section 13(b) clearly does, the district court may exercise the full sweep of its equitable powers. *FSLIC v. Dixon*, 835 F.2d at 561-562. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. at 289-293; see also *CFTC v. Hunt*, 591 F.2d at 1223.

Nor do other provisions of the FTC Act imply that Congress intended to bar the award of ancillary equitable relief, as petitioners claim. Pet. 25-28. Section 13(b), in addition to authorizing permanent injunctions, provides that "[u]pon a proper showing * * * a temporary restraining order or a preliminary injunction may be granted without bond." 15 U.S.C. 53(b). According to petitioners, the precise wording of the provision authorizing a preliminary injunction implies that it should be read narrowly. Reading the provision authorizing a preliminary injunction *in pari materia* with that authorizing a permanent injunction, petitioners argue that the latter provision, like the former, should be limited to its precise terms. The flaw in this logic, however, begins with the initial premise: the language authorizing preliminary injunctions is no narrower than that authorizing permanent injunctions. Indeed, courts have uniformly construed the preliminary injunction provision to authorize the award of the full range of equitable remedies. See *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-722 (5th Cir.), cert. denied, 456 U.S. 973 (1982); see also *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989); *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981).

The language of Section 19 of the FTC Act, 15 U.S.C. 57b, similarly fails to create the necessary inference that Section 13(b) is to be limited to the precise relief there described. Petitioners argue that because Section 19(b), 15 U.S.C. 57b(b), explicitly

authorizes "rescission" and the "refund of money," the failure to list such remedies in Section 13(b) evidences an intent to exclude such remedies as ancillary to the award of a permanent injunction. Contrary to petitioners' assumption, however, Section 19(b) and Section 13(b) are not simply alternative sources of remedies from which one could reason that their explicit availability in the former section impliedly excludes them in the latter section. Section 19 empowers the Commission to seek judicial redress on the basis of conclusive findings of illegality made by the Commission in an administrative adjudication. In a permanent injunction action under Section 13(b), by contrast, the court determines both liability and remedy. That Section 19 speaks with great specificity, while Section 13(b) does not, is thus no reason to restrict the latter's scope—the two sections serve entirely different purposes. Congress recognized this difference and expressly disavowed petitioners' construction by means of a "savings clause." Section 19(e), 15 U.S.C. 57b(e), ~~which~~ specifies that:

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

As the court of appeals in *FTC v. H.N. Singer, Inc.*, 668 F.2d at 1113, correctly observed, the savings clause rejects the inference that Congress intended to restrict the equitable remedies provided by Section 13(b) when it created the novel hybrid adjudication in Section 19.

Petitioners' reliance on the legislative history of the permanent injunction provision is similarly misplaced. Pet. 28-33. Courts have consistently ruled that nothing in the legislative history rebuts the pre-

sumption that ancillary equitable relief is available in a permanent injunction action brought under Section 13(b). *E.g.*, *FTC v. H.N. Singer, Inc.*, 668 F.2d at 1110-1111; *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d at 1027-1028. The only portion of the legislative history of Section 13(b) that discusses the permanent injunction provision (which is quoted in full in *Singer*, 668 F.2d at 1110-1111) provides several illustrative examples of situations in which a permanent injunction would be "proper," including cases of routine fraud. If the legislative history shows anything, it makes clear that Congress considered the permanent injunction remedy to be proper in that class of cases—ongoing routine fraud of the kind involved here—in which a preliminary injunction and monetary equitable relief are particularly appropriate. The legislative history neither expressly nor by inescapable inference limits the courts' equitable powers under Section 13(b).

2. Contrary to petitioners' contention, Pet. 52-63, both the court of appeals and the district court applied the correct legal standard in holding the individual petitioners liable for restitution for violations of the FTC Act committed by the corporations under their control. Pet. App. Exh. 3, at 19-21. An individual, such as a corporate officer or manager, is liable for restitution if he knew or should have known of the corporation's misrepresentations and either directly participated in them or possessed the authority to control them and failed to do so. See, *e.g.*, *FTC v. Atlantex Associates*, 1987-2 Trade Cas. (CCH) ¶ 67,788, at 59,254-59,255 (S.D. Fla. 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292-1293 (D. Minn. 1985); *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,506 at 68,458 (N.D.

Cal. 1983); *FTC v. H.N. Singer, Inc.*, 1982-1983 Trade Cas. (CCH) ¶ 65,011 at 70,619 (N.D. Cal. 1982).⁴

As their opinions amply demonstrate, both the court of appeals and the district court properly applied this well-established principle in assessing the liability of the individual petitioners. Pet. App. 83-92, Exh. 3, at 17-19. The record evidence established that McCann and Weiland designed and supervised the telephone sales operation on a day-to-day basis; they wrote the deceptive scripts and therefore knew of the material misrepresentations and omissions upon which the scripts were based; they were aware of the high volume of customer complaints and the excessive chargebacks which resulted from the deceptive scripts and the embellishing misrepresentations employed by the telemarketers; and by their own admission they had authority to control the deceptive sales operation. Pet. App. Exh. 3, at 19.⁵

⁴ Contrary to petitioners' contention, Pet. 58-61, the courts clearly required the Commission "to establish the defendants had or should have had knowledge or awareness of the misrepresentations." Pet. App. Exh. 3, at 18. However, the court of appeals properly rejected petitioners' argument that the Commission must prove subjective intent to defraud on the part of the individual defendants, holding instead that:

[the] knowledge requirement may be fulfilled by showing that the individual had "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." Also, the degree of participation in business affairs is probative of knowledge.

Ibid. (citations omitted).

⁵ Despite petitioners' attempts to minimize the role (and, thus, the knowledge) of petitioner Weiland, the record re-

As both courts correctly observed: “[O]ne may not enjoy the benefits of fraudulent activity and then insulate one’s self from liability by contending that one did not participate directly in the fraudulent practices.” *Ibid.* Petitioners’ fact-bound contention does not merit further review.

3. Petitioners assert that the magistrate erroneously excluded certain testimony offered by petitioners to prove that they relied on the advice of counsel. That evidence was properly excluded as cumulative and redundant. According to the court of appeals: “An examination of the record and the trial court’s opinion shows that the magistrate was sufficiently aware of [petitioners’] efforts to get counsel’s approval of corporate practices.” Pet. App. Exh. 3, at 21 n.8. In addition, exclusion of petitioner’s additional advice-of-counsel testimony did not prejudice petitioners. Both the magistrate and the court of appeals assumed that petitioners had relied on the advice of counsel. They determined, however, that “reliance on advice of counsel was not a valid defense on the question of knowledge; counsel could not sanction something that the [petitioners] should have known was wrong.” *Id.* at 21. Finally, because petitioners present no argument or authority to support their assertion, there is no reason to review the conclusion of the lower courts that that testimony was properly excluded. See Sup. Ct. R. 21.1(j), 21.5.

flects that Weiland was a principal shareholder and officer of the corporations and, together with petitioner McCann, created and developed the business, controlled its financial affairs, wrote the deceptive sales scripts, and reviewed the sales reports and other information. Pet. App. 88-89, Exh. 3, at 19-20. Moreover, Weiland regularly consulted with McCann regarding the daily sales operation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989